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## Restructuring Intellectual Property Jurisdictions Post-Brexit: Strategic Considerations for the EU and Britain

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# RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTION POST- BREXIT: STRATEGIC CONSIDERATIONS FOR THE EUROPEAN UNION AND BRITAIN

*Alexandra George\**

INTRODUCTION .....	132
I. TERMINOLOGY AND ASSESSING OUTCOMES: A HARD OR SOFT BREXIT? .....	138
II. GENERAL CONSIDERATIONS AFFECTING INTELLECTUAL PROPERTY LAW-MAKING IN EUROPE.....	140
<i>A. The Scope of ‘Intellectual Property’</i> .....	141
<i>B. Territorial Rights</i> .....	142
<i>C. The WTO and TRIPS</i> .....	142
<i>D. TRIPS Plus</i> .....	143
<i>E. Jurisdictional Complexity</i> .....	144
III. BREXIT’S EFFECT ON INTELLECTUAL PROPERTY JURISDICTION IN THE EUROPEAN UNION .....	145
<i>A. The Development of the European Union</i> .....	146
<i>B. Legislative Jurisdiction over Intellectual Property     Law</i> .....	147
<i>C. Administration &amp; Determination of Intellectual Property     Matters</i> .....	149

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1. General Courts .....	150
2. EUIPO—Trademarks and Designs .....	151
3. EPO & UPC—Patents .....	155
4. National Registry Offices and Courts .....	165
IV. RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTIONS: POST-BREXIT OPTIONS .....	166
<i>A. The Norway Option</i> .....	168
<i>B. The Swiss Approach</i> .....	170
<i>C. The Treaty Approach (“WTO Approach” or “Canada     Approach”)</i> .....	172
V. LOOKING FORWARD .....	174
<i>A. Quarantining Brexit’s Intellectual Property     Negotiations</i> .....	175
<i>B. Laying EU Foundations for Global Intellectual Property     Harmonization?</i> .....	177
<i>C. Precedents for Harmonization via Supra-Territorial     Registries</i> .....	179
<i>D. An Alternative to Top-Down Intellectual Property     Harmonization Projects?</i> .....	181
<i>E. Brexit as a Trigger for Global Intellectual Property     Harmonization?</i> .....	186
CONCLUSION .....	188

## INTRODUCTION

On Thursday, June 23, 2016, Britain<sup>1</sup> went to the polls, in which a 52 percent majority voted for “Brexit,” the colloquial term for Britain’s exit from the European Union. Within a year, British Prime Minister Theresa May invoked Art. 50 of the

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1. For the purposes of this article, the names “Britain” and the “United Kingdom” are used interchangeably to refer to the jurisdiction officially known as the United Kingdom of Great Britain and Northern Ireland.

Treaty of Lisbon,<sup>2</sup> formally commencing the process of withdrawing Britain from the European Union.<sup>3</sup> By April 2019, the formal separation is supposed to be complete.<sup>4</sup> The referendum result and subsequent events have sparked fears about what will happen to intellectual property investments in Britain and the European Union in the coming years. This concern is justified, as post-Brexit arrangements between the European Union

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2. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 O.J. C 306/1 [hereinafter Treaty of Lisbon]. Article 50 of the Treaty of Lisbon states:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

*Id.*

3. The European Union (Notification of Withdrawal) Bill became law after passing through Parliament on March 13, 2017. European Union (Notification of Withdrawal) Act 2017, c. 9 (Eng.), <http://www.legislation.gov.uk/ukpga/2017/9/contents/enacted/data.htm>. On March 29, 2017, a letter from Prime Minister May announcing Britain's intention to withdraw from the EU was delivered in accordance with the Treaty of Lisbon and triggered Article 50. Theresa May, British Prime Minister, Letter to Donald Tusk (Mar. 29, 2017), <http://uk.reuters.com/article/uk-britain-eu-letter-text/text-of-pm-mays-letter-to-eus-tusk-triggering-brexit-process-idUKKBN1701JH>.

4. Treaty of Lisbon, *supra* note 2, art. 50. Article 50 states that:

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

*Id.*

and Britain, with respect to intellectual property laws, have yet to be determined.

Having developed the world's largest "single market," the European Union, which is comprised of twenty-eight member nations, is currently one of the world's largest economies<sup>5</sup> and a global intellectual property hub. Recent reports indicate that products of intellectual property intensive industries account for 88 percent of EU imports and 90 percent of EU exports.<sup>6</sup> Meanwhile, intellectual property intensive sectors account for around 26 percent of EU employment and 39 percent, or EUR 4.7 trillion, of EU gross domestic product (GDP) per annum.<sup>7</sup> Within Britain, intellectual property intensive industries amount to 37.4 percent of GDP and provide 26.7 percent of employment.<sup>8</sup> Using a variety of indicators, including intellectual property statistics, to rank nations according to global innovation trends, the 2016 *Global Innovation Index* reported that European countries dominated the 'top ten' list of the world's most innovative nations,<sup>9</sup> with Britain ranking third.<sup>10</sup> European intellectual property offices account for a sizable proportion of the world's filing concentrations for patents, trademarks, and designs,<sup>11</sup> while a

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5. EUROSTAT, THE EU IN THE WORLD 79 (2016), <http://ec.europa.eu/eurostat/documents/3217494/7589036/KS-EX-16-001-EN-N.pdf/bcacb30c-0be9-4c2e-a06d-4b1dae4d493e>. This statistical report states that the twenty-eight member European Union, "accounted for a 23.8% share of the world's GDP" in 2014, which was the largest single share ahead of the USA at 22.2%. *Id.* It states that the European Union "was the world's largest exporter and importer of services in 2014," *id.* at 96, and comprised 6.9% of the world's population in 2015, *id.* at 21, fig. 1.1.

6. OFF. FOR HARMONIZATION IN THE INTERNAL MKT., INTELLECTUAL PROPERTY RIGHTS INTENSIVE INDUSTRIES: CONTRIBUTION TO ECONOMIC PERFORMANCE AND EMPLOYMENT IN THE EUROPEAN UNION 63 (2013), [http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf).

7. *Id.* at 6.

8. *Id.* at 83, fig. 14.

9. THE GLOBAL INNOVATION INDEX 2016: WINNING WITH GLOBAL INNOVATION 14 (Soumitra Dutta, Bruno Lanvin, & Sacha Wunsch-Vincent eds., 2016), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_gii\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2016.pdf). In 2016, European nations accounted for eight of the top ten most innovative nations. *Id.* The ranking was as follows: Switzerland, Sweden, the United Kingdom, the United States, Finland, Singapore, Iceland, Denmark, the Netherlands, and Germany. *Id.*

10. *Id.*

11. WORLD INTELL. PROP. ORG., WIPO IP FACTS AND FIGURES 6 (2015), [www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_943\\_2015.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2015.pdf).

majority of the top fifty applicants for international Madrid System trademarks are European companies.<sup>12</sup> A study into the international mobility of inventors also reported that, between 2006–2010, over 30 percent of the world's immigrant inventors chose European jurisdictions as their new homes,<sup>13</sup> with Britain ranking third in the world.<sup>14</sup> Intellectual property is thus extremely important to Britain and the broader European Union.

Given the value of intellectual property investments to Britain and the rest of the European Union, as well as the importance that the European Union has placed on intellectual property laws in the generation of economic activity, it is in the interests of both Britain and the rest of the European Union to establish a plan that will maintain stability for European intellectual property arrangements following Brexit. Indeed, it may be in the interests of both Britain and the broader European Union to go a step further and maintain *de facto* harmonization of British and EU intellectual property laws.

The journey towards Brexit involves a two-year Art. 50(2) negotiating phase,<sup>15</sup> in which administrative arrangements should be settled between Britain and the European Union. The focus in this phase is on “setting out the arrangements for [Britain’s] withdrawal, taking account of the framework for its future relationship with the Union.”<sup>16</sup> In practice, this involves resolving issues such as the status of EU citizens residing in Britain and British citizens residing in the European Union, borders (such as the land border between Northern Ireland, which will be included in Brexit, and the Republic of Ireland, which will remain in the European Union), and a financial settlement.<sup>17</sup> If the par-

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12. In 2015, thirty-seven of the top fifty Madrid System trademark applicants were European-based companies. WORLD INTEL. PROP. ORG., MADRID YEARLY REVIEW 16 (2015), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_940\\_2015.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_940_2015.pdf).

13. WORLD INTEL. PROP. ORG., 2013 WORLD INTELLECTUAL PROPERTY INDICATORS 25 (2013), [http://www.wipo.int/edocs/pubdocs/en/intprop-erty/941/wipo\\_pub\\_941\\_2013.pdf](http://www.wipo.int/edocs/pubdocs/en/intprop-erty/941/wipo_pub_941_2013.pdf).

14. *Id.*

15. Treaty of Lisbon, *supra* note 2, art. 50.

16. *Id.*

17. Michael Barnier, Chief Negotiator for the Preparation and Conduct of the Negotiations with the U.K., *The Conditions for Reaching an Agreement in the Negotiations with the United Kingdom*, SPEECH/17/723 (Mar. 22, 2017), [http://europa.eu/rapid/press-release\\_SPEECH-17-723\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-723_en.htm).

ties cannot agree, or Britain is unwilling to accede to EU demands, the European Parliament can veto any settlement.<sup>18</sup> Britain's stated position is that, "no deal for Britain is better than a bad deal for Britain."<sup>19</sup> The uncertainty, however, caused by Brexit occurring without any agreement as to Britain's future relationship with the European Union would be a negative scenario for both parties. As such, both will presumably try to avoid this outcome.

In addition, Britain would like the primary negotiations to be accompanied by secondary negotiations towards an agreement or agreements concerning specific issues, such as trade, customs, and intellectual property law. EU leaders, however, have expressed a lack of interest or intent to engage in the secondary negotiations until the primary negotiations have been concluded.<sup>20</sup>

Regardless of political posturing, the nature of intellectual property laws and interests within Europe mean that, in order to avert very predictable and costly problems, some jurisdictional restructuring will need to be in place by the date Brexit occurs, even if this is only in the form of transitional arrangements. To leave intellectual property jurisdiction unaddressed at the point at which Britain departs the European Union would create tremendous uncertainty, if not a degree of panic and/or chaos, among intellectual property holders and users. The value of intellectual property assets in Europe, and their economic importance, means this would not be a positive outcome for either the European Union or a newly independent Britain.

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18. European Parliament Press Release, *Red Lines on Brexit Negotiations* (Apr. 6, 2017), <http://www.europarl.europa.eu/news/en/news-room/20170329IPR69054/red-lines-on-brex-it-negotiations>.

19. Theresa May, British Prime Minister, Speech at Lancaster House, London, (Jan. 17, 2017), <http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brex-it-speech-full/> [hereinafter Lancaster House Speech].

20. Alex Barker & Guy Chazan, *Barnier Sticks to 'Divorce First, Trade Talks Later' Mantra*, FIN. TIMES (Jan. 17, 2017), <https://www.ft.com/content/937f71c2-dcd5-11e6-9d7c-be108f1c1dce>; Jennifer Rankin et al., *Brexit: EU Says No to Free Trade Talks Until 'Progress' on Final Terms*, GUARDIAN (Mar. 31, 2017), <https://www.theguardian.com/politics/2017/mar/31/eu-willing-to-discuss-free-trade-deal-before-final-terms-of-brex-it>; Raf Casert, *EU Legislators Tell UK on Brexit: No Parallel Talks*, ASSOC. PRESS (Apr. 5, 2017), [http://hosted2.ap.org/APDEFAULT/cae69a7523db45408eeb2b3a98c0c9c5/Article\\_2017-04-05-EU—Europe-Brexit/id-d8a390cc134d4ebba818594df6e794d3](http://hosted2.ap.org/APDEFAULT/cae69a7523db45408eeb2b3a98c0c9c5/Article_2017-04-05-EU—Europe-Brexit/id-d8a390cc134d4ebba818594df6e794d3).

Focusing on implications for intellectual property law and interests, this article identifies jurisdictional issues that will need to be renegotiated and restructured as Brexit approaches. The results will influence the post-Brexit future of intellectual property within the European Union and Britain, and questions about substantive intellectual property arrangements<sup>21</sup> will remain ambiguous until these jurisdictional issues have been resolved. The article remains neutral with respect to political issues (such as the merits or otherwise of Brexit, and the merits or otherwise of particular intellectual property laws or intellectual property harmonization more generally), instead assessing laws in terms of what the European Union and/or Britain have sought to accomplish with respect to intellectual property. Without supporting the position of either Britain or the European Union over the other, this article identifies strategic priorities that should concern Brexit negotiators on both sides of the bargaining table.

Part I of this article will introduce terminological issues that affect the way in which Brexit outcomes are understood, and against which outcomes will be assessed. Part II will then discuss general considerations that will constrain the flexibility of Brexit negotiators with respect to intellectual property law. These include issues such as the scope and territorial nature of intellectual property law, the international intellectual property framework, and jurisdictional complexity. Part III will analyze the structure of EU intellectual property jurisdiction pre-Brexit, marking the starting point from which negotiations must commence, and it discusses doctrine-specific jurisdictional issues that will need to be addressed. Part IV will then consider how intergovernmental arrangements might be reorganized, thus refashioning the environment in which decisions about intellectual property laws can be made. For example, after leaving the European Union, will Britain remain within the European Free Trade Association (EFTA) and/or the European Economic Area (EEA)? If so, Brexit is less likely to have a dramatic impact on intellectual property relations between the European Union and Britain, or on intellectual property holders in those jurisdictions.

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21. For substantive questions affecting copyright, patent, designs, trademarks, and other intellectual property doctrines, see generally Alexandra George, *Just Keep Calm & Carry On: The Impact of Brexit on Intellectual Property Laws in Britain and the European Union*, 1 J. INTELL. PROP. STUD. 90 (2017).



Or will Britain go an entirely separate way? If so, a treaty will presumably be sought to govern Britain's post-Brexit relations with the European Union, which would be negotiated under World Trade Organization (WTO) rules. While previous trade agreement negotiations may hint at the sort of deal that the European Union would be prepared to enter, Brexit creates novel conditions. Whatever the ultimate resolution, the implications for intellectual property cooperation between the European Union and Britain are likely to be significant. Finally, Part V will provide a discussion of whether Brexit will necessarily signal a fragmentation of intellectual property jurisdiction in Europe, or, if Brexit could in fact lay the foundations for a new era of globalization of intellectual property laws in an EU image.

#### I. TERMINOLOGY AND ASSESSING OUTCOMES: A HARD OR SOFT BREXIT?

Prior to examining the substantive issues, mention should be made of the terminology that this article uses to describe jurisdictional outcomes arising from Brexit. Assessments of the likely impact of decisions to be made about Britain's departure from the European Union are commonly couched in the language of "hard/clean" and "soft" Brexit.<sup>22</sup> The hard/soft terminology, however, can be controversial,<sup>23</sup> and the meaning of these terms can vary depending on the contexts in which they are used.<sup>24</sup> Some preliminary explanation is therefore necessary.

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22. For media explanations of the "soft" and "hard" Brexit terminology, see J.P., *What is the Difference Between a "Hard" and "Soft" Brexit?* ECONOMIST (Oct. 5, 2016), <https://www.economist.com/blogs/economist-explains/2016/10/economist-explains-3>; Alexandra Sims, *What is the Difference Between Hard and Soft Brexit? Everything You Need to Know*, INDEPENDENT (Oct. 4, 2016), <http://www.independent.co.uk/news/uk/politics/brexit-hard-soft-what-is-the-difference-uk-eu-single-market-freedom-movement-theresa-may-a7342591.html>.

23. British Prime Minister Teresa May rejects use of this terminology altogether, stating "I don't accept the terms hard and soft Brexit." Elizabeth Piper, *Hard Brexit is Not Inevitable, Says May*, REUTERS (Jan. 10, 2017), <http://uk.reuters.com/article/uk-britain-eu-may-sterling-idUKKBN14T1AO>.

24. Politicians and commentators sometimes use the 'hard' and 'soft' Brexit terminology with related but different meanings. For example, the European Union is both a single market and a customs union. Used in this context, a hard Brexit would involve Britain leaving both the single market and the customs union. By contrast, a soft Brexit would occur if Britain remained within the single market (the EEA) but not the customs union, or vice versa.

Throughout this article, hard/soft terminology refers to the degree of difference from pre-Brexit arrangements that will be brought about by Britain's departure from the European Union. Referring to the gradations of upheaval that would be caused by different Brexit scenarios, this terminology places potential Brexit arrangements on a spectrum from the softest to the hardest options.

In this context, a soft Brexit would entail little change, with many of the pre-Brexit arrangements between Britain and the European Union remaining in place after Brexit occurs, and little practical difference between the pre- and post-Brexit relationship between Britain and the European Union.<sup>25</sup> This could be achieved, for example, by Britain leaving the European Union but not the EEA (discussed below as the "Norway Option"). European Council<sup>26</sup> president Donald Tusk, however, has stated: "I think it is useless to speculate about 'soft Brexit'. . . . These would be purely theoretical speculations. In my opinion, the only real alternative to a 'hard Brexit' is 'no Brexit'. Even if today hardly anyone believes in such a possibility."<sup>27</sup> In light of such statements, a soft Brexit seems unlikely.

By contrast, a hard Brexit would involve a sharp break from the arrangements in existence pre-Brexit, with Britain's departure from the European Union causing dramatic adjustments to

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25. The House of Commons Library in the British Parliament has published a glossary of Brexit terms, in which it defines "soft Brexit" as "[a] situation in which the UK leaves the EU but negotiates continued membership of the European Economic Area (EEA) and largely staying in the single market while giving up influence over single market rules." *Brexit Glossary*, PARLIAMENT.UK (Mar. 13, 2017), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7840> (last visited Sept. 19, 2017) [hereinafter The House of Commons Library Glossary].

26. Under Article 68 of the Treaty on the Functioning of the European Union (TFEU), the European Council establishes the EU's political and policy agenda. Consolidated Version of the Treaty on the Functioning of the European Union art. 68, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Its 'conclusions' are adopted by consensus among all Member States, with its membership consisting of the Member States' heads of state/government, the President of the European Council, and the President of the European Commission. *Id.*

27. Donald Tusk, European Council President, Speech at the European Policy Centre conference, SPEECH 575/16 (Oct. 13, 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/10/13-tusk-speech-epc/>.

its relationships with the EU Member States.<sup>28</sup> Donald Tusk summarized this as the British “demand to ‘take back control’”. Namely the ‘liberation’ from European jurisdiction, a ‘no’ to the freedom of movement or further contributions to the EU budget.”<sup>29</sup> This seems to be the sort of Brexit that both parties anticipated as negotiations began.

From an intellectual property perspective, a hard Brexit would necessitate sweeping reformation of British domestic laws in response to the loss of access to EU intellectual property registration and enforcement regimes. In due course, it would probably also lead to British intellectual property laws diverging from the EU standards they complied with pre-Brexit. This sort of hard Brexit would have a significant impact on the European Union by reducing the territory and population over which its intellectual property frameworks have jurisdiction. In turn, this would detract from the EU’s appeal to businesses and investors.

This article examines how Brexit could play out for intellectual property and suggests that, even if a hard Brexit is negotiated overall, there is scope for arrangements to be put in place that would effect a harder Brexit with respect to some areas of the law, while allowing for a softer Brexit with respect to other areas of the law. Even if there was a harder Brexit with respect to one area of intellectual property law (such as copyright), there might simultaneously be a softer Brexit with respect to other areas of intellectual property law (such as trademarks and/or patents). Given the environment in which discussions about post-Brexit intellectual property jurisdiction will occur, this nuanced approach may well produce the best possible outcome for both parties.

## II. GENERAL CONSIDERATIONS AFFECTING INTELLECTUAL PROPERTY LAW-MAKING IN EUROPE

Negotiations between Britain and the European Union concerning Brexit and beyond will be confined by international laws that affect intellectual property law making throughout the world. Negotiations will also begin from a base-line starting

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28. See The House of Commons Library Glossary, *supra* note 25. A “hard Brexit” has been defined as “[a] situation in which the UK leaves the EU swiftly and probably with a free trade agreement (FTA) with the EU. A very hard Brexit would involve resorting to WTO rules.” *Id.* These options are discussed further in Part IV of this article.

29. Tusk, *supra* note 27.

point of existing jurisdictional arrangements. Both of these factors exist separately from Brexit considerations, but will influence, shape, and constrain negotiations as they relate to post-Brexit intellectual property arrangements in Britain and the European Union. This Part will provide a broad overview of important aspects of European and international intellectual property law that will restrict the options open to Brexit negotiators on both sides of the table, including jurisdictional issues and the constraints imposed by multinational treaties.

### A. The Scope of 'Intellectual Property'

By its very nature, intellectual property is an exceedingly complex area of law. It has a long history that stretches beyond the domestic laws of nation states, and law-making in this area has often been entwined with considerations about international influence and trade. The legacy is a network of intellectual property laws created over centuries and forged by decisions of states and non-state actors alike.

Intellectual property comprises several distinct legal doctrines, including patents, trademarks, copyright, designs. It also includes other laws that are equivalent in function to those often referred to beyond Europe as *sui generis* laws.<sup>30</sup> Each of these has different rules with respect to the identification and/or grant of property interests, the nature of the rights that attach to those interests, and when those rights are infringed.

Since the late 1800s, the definition and development of intellectual property laws have been shaped by a succession of international treaties that not only affect relations between nations, but also impact the form intellectual property laws can take within nation states. The conclusion of the Paris Convention for the Protection of Industrial Property (1883)<sup>31</sup> and the Berne Convention for the Protection of Literary and Artistic Works

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30. In Europe, one must take care that the term 'sui generis' laws is not confused with 'sui generis database laws.' In other jurisdictions, distinct areas of intellectual property law that do not fall within the core intellectual property doctrines of copyright, design, patent, or trade mark law, are often referred to as *sui generis*. Within Europe, however, that term has become widely associated with database protection.

31. See generally Convention of Paris for the Protection of Industrial Property, March 20, 1883, 828 U.N.T.S. 107 [hereinafter Paris Convention].

(1886)<sup>32</sup> set the scene for an international standardization of intellectual property principles that has continued for well over a hundred years.

The intrinsic nature of intellectual property and its global governance framework will limit decisions that the European Union and Britain will be able to make with respect to this area of law.

### *B. Territorial Rights*

Intellectual property laws are territorially based, meaning each sovereign state can make laws creating intellectual property, and rights attaching to that property, which can be enforced within its domestic borders. As such, intellectual property laws have traditionally been national in character, with cross-border issues being governed by treaties and general conflict of laws principles.

EU law created new conditions by enacting supranational intellectual property laws. These are vividly exemplified by the European Union Trade Mark system that applies throughout the European Union, and also by pan-EU laws that permeate copyright, patent, design, and other areas of intellectual property.

One of the challenges for Brexit negotiators will be to preserve the existing benefits that accrue to both the European Union and Britain from the latter's participation in the former's supranational intellectual property legal frameworks.

### *C. The WTO and TRIPS*

Even if the European Union and Britain choose to go their separate ways through a hard Brexit approach to intellectual property laws, and even if their laws were then to diverge through subsequent legislative action and judicial interpretation, the constraints of multilateral agreements should ensure that the intellectual property laws of Britain and the European Union remain substantially standardized post-Brexit.

The content of modern intellectual property laws continues to be strongly determined by a series of international treaties, the most significant of which is the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property

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32. See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217 [hereinafter Berne Convention].

Rights (“TRIPS Agreement”).<sup>33</sup> Concluded in 1994, this multilateral agreement consolidated core intellectual property principles and provided standard conceptual foundations for intellectual property laws throughout much of the world. Covering copyright, designs, patents, trademarks, and some other areas of intellectual property, the TRIPS Agreement elucidated base standards of intellectual property protection that all signatories are required to implement in their domestic laws. While the manner in which they do so is left to individual states,<sup>34</sup> the inclusion of TRIPS-consistent principles in the laws of all 164 WTO Member States has led to a high degree of standardization of intellectual property laws worldwide.

All EU Member States are WTO members, with the European Union being a WTO Member State in its own right. All are therefore obliged to adopt TRIPS-standards with respect to the minimum levels of intellectual property protection provided within their territorial boundaries. TRIPS-standards match or exceed those of earlier intellectual property agreements, thus entrenching an underlying level of standardization throughout WTO Member States. This standardization, however, is not comprehensive. The international treaties demand only that *minimum* standards of intellectual property protection be implemented, leaving it to signatories to determine how best to incorporate the principles into domestic laws. Where European states have chosen to adopt higher standards than required by the treaties, or where the standards are not prescriptive about certain aspects of intellectual property law, diverse laws can be found across the European Union.

#### *D. TRIPS Plus*

European jurisdictions were active in helping to shape the final text of the TRIPS Agreement and, since that time, many EU intellectual property laws have become “TRIPS Plus” in nature. In other words, their provisions not only comply with TRIPS but are more stringent than what is required by the TRIPS Agreement.

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33. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

34. *Id.* art.1(1).

In negotiations for free trade agreements (FTAs), the European Union typically seeks the insertion of TRIPS Plus standards in the laws of other nations.<sup>35</sup> As the most likely scenario is probably that Britain and the European Union will eventually conclude an FTA, setting out the terms on which trade will occur between them post-Brexit, it can be expected that longer term post-Brexit intellectual property arrangements between the two jurisdictions would maintain existing TRIPS Plus standards, even if practicalities and pragmatism demand that transitional arrangements for the interim period be more administrative and less substantive.

### *E. Jurisdictional Complexity*

The property rights granted by intellectual property laws are private in nature, yet the proprietor and/or the state may take enforcement actions in various circumstances. Indeed, intellectual property implicates private and public law, domestic and international law, and criminal and civil law, resulting in a high level of complexity. This complexity is intensified within the European Union, where layers of jurisdiction overlap and sometimes operate simultaneously; where some aspects of intellectual property laws are harmonized and/or uniform, but others are not; where diverse legal traditions lead to compromises as standards are negotiated; and where law-makers' decisions ultimately tend to have a significant influence on the development of intellectual property law, policy, and governance worldwide.

A hard Brexit arrangement would involve disentangling British intellectual property law from its European Union counterpart, requiring many businesses to register new patents, trademarks, and/or designs in one or other jurisdiction if they wish to maintain existing levels of protection over their assets. Following a hard Brexit, British intellectual property laws would likely start to diverge from their European Union counterparts—both in their content and their interpretation—adding complexity and cost for those using this area of law. By contrast, a 'soft

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35. For commentary, see, e.g., KEITH MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 131 (2012); ARVID LUKAUSKAS ET AL., HANDBOOK OF TRADE POLICY FOR DEVELOPMENT 559 (2013); EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? (Josef Drexler et al. eds., 2013).

Brexit' outcome, with respect to intellectual property, could result in arrangements that are not dissimilar from those currently in operation. This would bring the likelihood of substantial continuity for users of intellectual property laws.

The British government has sought to reassure the intellectual property community, stating:

We recognise that for EU trade marks, users will want clarity over the long-term coverage of those rights. The government is exploring various options and we will be consulting users of the system about the best way forward. Even after the UK leaves the EU, UK businesses will still be able to register an EU trade mark, which will cover all remaining EU Member States.<sup>36</sup>

It made an almost identical statement with respect to designs.<sup>37</sup>

Uncertainty about these issues, however, seems likely to persist for some time. This is partly because post-Brexit arrangements between the European Union and Britain will require years of negotiation, first, with respect to the Article 50 arrangements concerning how Britain will depart from the European Union and, second, with respect to whatever agreements are reached to govern relations between Britain and the European Union post-Brexit.

Adding to the uncertainty is the intricacy of the EU intellectual property *acquis*, which means that various intellectual property doctrines will probably need to be dealt with one-by-one. It could, therefore, be a lengthy process before outcomes are concluded. Uncertainty is intensified by the likelihood of a hard Brexit, as this would result in more arrangements having to be negotiated piecemeal than would other Brexit options. The details of post-Brexit arrangements are particularly unpredictable in an environment in which both sides will be seeking to protect their own interests, which may include non-intellectual property interests, and could use intellectual property as a bargaining chip to trade against other assets.

### III. BREXIT'S EFFECT ON INTELLECTUAL PROPERTY JURISDICTION IN THE EUROPEAN UNION

Whether hard, soft, or somewhere in between, Brexit will bring about jurisdictional modifications that will affect, perhaps quite

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36. *IP and Brexit: The Facts*, Gov.UK (Aug. 2, 2016), <https://www.gov.uk/government/news/ip-and-brexit-the-facts>.

37. *Id.*



significantly, intellectual property arrangements in Britain and the European Union. This Part will survey the pre-Brexit jurisdictional arrangements that will form the starting point for negotiations, including the existing intellectual property framework within the European Union. It will also identify areas of those arrangements that can be expected to change.

#### *A. The Development of the European Union*

While intellectual property has not always been one of the European Union's priority policy areas, the European Union's founding *raison d'être* helps to explain why intellectual property became so important to the growth of the organization that Britain has decided to leave. It also helps to explain why, even despite pre-negotiation rhetoric that might suggest otherwise, self-interest may encourage the European Union to work to maintain a tight or soft(er) Brexit arrangement with Britain around intellectual property law.<sup>38</sup>

Following the destruction experienced by Europe during World War II, a 1950 landmark speech by French foreign minister Robert Schuman, known as the Schuman Declaration, set out a vision for a peaceful and united continent characterized by economic integration.<sup>39</sup> Schuman proposed that:

The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe. . . . The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same

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38. See, e.g., Ben Chapman, *Brexit: Britain Must be Made Worse-Off After Leaving EU, Says Austrian Chancellor*, INDEPENDENT (Feb. 13, 2017), <http://www.independent.co.uk/news/business/news/brexit-britain-must-be-made-worse-off-after-leaving-eu-says-austrian-chancellor-christian-kern-a7578206.html>; Ashley Cowburn, *Brexit: UK Must Not be Better Off Outside EU, Warns French Senate Report*, INDEPENDENT (Feb. 16, 2017), <http://www.independent.co.uk/news/uk/politics/brexit-britain-must-not-be-better-off-outside-eu-says-french-senate-report-a7582886.html>.

39. *The Schuman Declaration*, EUR. UNION (May 9, 1950), [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en) (last visited Oct. 20, 2017) [hereinafter Schuman Declaration].

terms, will lay a true foundation for their economic unification.<sup>40</sup>

Two years later, Belgium, France, West Germany, Italy, the Netherlands, and Luxembourg formed the European Coal and Steel Community, laying the foundations for what would eventually become the European Union. In 1957, the same nations formed the European Economic Community (EEC) and, following ‘enlargement’ through the accession of other European nations—including Britain in 1973—the European Union was formed on November 1, 1993.<sup>41</sup> The foundations were in place for harmonization of European laws.

Throughout the post-war period, intellectual property remained largely a matter of domestic law in European nations. While international treaties brought about a degree of standardization of intellectual property concepts and laid out principles for cross-jurisdictional treatment of intellectual property,<sup>42</sup> intellectual property was not part of European integration agreements at this stage. It is unsurprising, however, that for an organization committed to fostering economic cooperation and interdependence, intellectual property would soon become a valuable mechanism for achieving these ends.

### *B. Legislative Jurisdiction over Intellectual Property Law*

The EU’s originating treaties in the early 1990s did not mention intellectual property,<sup>43</sup> and this area of law continued to remain within the domestic jurisdictions of EU Member States. As

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40. *Id.*

41. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht TEU].

42. Most notable among these were the aforementioned Paris Convention and Berne Convention. Paris Convention, *supra* note 31; Berne Convention, *supra* note 32. For well over a century, these two conventions helped to shape the nature of intellectual property laws in Europe and internationally. Both found their genesis in a nineteenth century Western Europe, which was fearful of international piracy and counterfeiting. As a result, both set out minimum standards of intellectual property protection required to be afforded in the laws of signatory states. Post-Brexit, both the European Union and Britain will remain Member States of these conventions and the TRIPS Agreement, ensuring an ongoing degree of standardization of intellectual property laws, regardless of what EU—Britain arrangements are concluded during the negotiation period.

43. Guy Tritton & Richard Davis, *INTELLECTUAL PROPERTY IN EUROPE* 31, ¶ 1–40 (2nd ed. 2002).

it became clear, however, that intellectual property matters were important to the functioning of a common market, and intellectual property matters came before the Court of Justice of the European Union (CJEU) in relation to other areas of EU law,<sup>44</sup> intellectual property law was incorporated into EU jurisprudence.

The Treaty on the Functioning of the European Union<sup>45</sup> (TFEU) now specifies:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.<sup>46</sup>

On this basis, the European Union has explicit power to legislate in the area of intellectual property. EU Member States must therefore comply with and *harmonize* their domestic laws by reference to a series of laws, known as Regulations and Directives, with respect to intellectual property law.

In practice, this means that Member States are required to implement domestic legislation to achieve the objectives set out in the Directives. While states are given flexibility as to how they will achieve those objectives (hence 'harmonization' rather than 'uniformity' in the laws), Directives are binding as to the result to be achieved and the timetable in which this should occur.

In addition to the Directives, the Council has promulgated a large collection of Regulations with respect to intellectual property. Regulations have 'general application,' meaning they become legally enforceable in all Member States upon commencement, and they override any inconsistent national law that previously existed. Areas of intellectual property law that are dealt with in Regulations have become relatively well-harmonized, but their application in Britain is likely to be directly impacted by Brexit.

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44. See, e.g., Case C-56/64 & C-58/64, *Établissements Consten SARL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 1968 E.C.R. 299.

45. TFEU, *supra* note 26, art. 118.

46. *Id.*

The body of harmonized EU law became known as the *acquis communautaire* or *Community acquis*. In the area of intellectual property law, this *acquis* contains Directives with respect to copyright, designs, patents, and trademarks, as well as related fields such as plant varieties, geographical indications, semiconductor topographies, and the enforcement of intellectual property laws.

Following Brexit, EU Directives and Regulations will no longer apply directly in Britain. The British Parliament will have the freedom to determine whether domestic law replicates EU law and, if so, to what degree. To this end, Theresa May has announced a ‘Great Repeal Bill,’ which is planned to come into force on the date of Britain’s exit from the European Union. At that point, it would repeal the instrument by which Britain joined the European Union<sup>47</sup> and end the supremacy of EU law in Britain. It would also transpose existing EU law into British legislation, which the government could then amend, repeal, or improve on a case-by-case basis.<sup>48</sup>

The delegated powers provisions of the Great Repeal Bill<sup>49</sup> will be important in the context of intellectual property laws that, pre-Brexit, are entwined with EU law through the direct application of Regulations. The Great Repeal Bill White Paper does not refer specifically to intellectual property laws and it is thus far unclear how Britain intends to transpose and/or amend laws referring to EU institutions, such as the European Union Intellectual Property Office (EUIPO). To avoid widespread confusion and disruption, this is a matter that will need to be settled prior to the date Brexit takes effect.

### *C. Administration & Determination of Intellectual Property Matters*

Registration of intellectual property under EU law, and interpretation of the EU’s legislation and findings on its application, are made by a variety of decision-making authorities. Post-

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47. See generally European Communities Act 1972, c. 68 (Eng.), <http://www.legislation.gov.uk/ukpga/1972/68/contents>.

48. *Policy Paper of the Dept. for Exiting the European Union on Legislating for the United Kingdom’s Withdrawal from the European Union*, 13–18, (Mar. 30, 2017), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf) [hereinafter Great Repeal Bill White Paper].

49. *Id.* at 19–25.

Brexit, jurisdiction over some matters currently dealt with by EU institutions will devolve to British institutions.

### 1. General Courts

The EU's court structure, or CJEU, comprises the General Court (known until December 1, 2009 as the Court of First Instance or CFI), the European 'Court of Justice' (ECJ), and the Civil Service Tribunal. The ECJ is the highest court with respect to EU law, and the decisions of its twenty-eight judges, assisted by eleven independent Advocates-General who present independent legal opinions on matters before the Court, have significantly influenced the harmonization of intellectual property laws throughout Europe.

In addition, national courts may make references for preliminarily rulings from the ECJ to guide them in the determination of a dispute in the domestic jurisdiction. This process aids the harmonization project by increasing consistency in the application of intellectual property law across European states.

After leaving the European Union, Britain will no longer be subject to decisions of the CJEU, and the highest British court of appeal will be the Supreme Court of the United Kingdom ("Supreme Court").<sup>50</sup> Historic decisions of the CJEU that apply on the date of Brexit will attract the same precedent status as decisions of the Supreme Court,<sup>51</sup> and the letter of EU-influenced statutory law in Britain may persist unchanged for some time after Brexit. Britain could even decide to maintain intellectual property legislation that is harmonized with EU intellectual property laws. In practice, judicial rulings will probably lead to diverse interpretations in different jurisdictions, disparities will probably emerge between British and EU applications of intellectual property laws, and British and EU intellectual property law may start to diverge on particular points. This is more likely to occur due to differences of approach between the English common law tradition and the Continental civil law tradition.

While Britain could decide to soften its exit from the European Union with respect to intellectual property by replicating EU

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50. In Scotland, the High Court of Justiciary would be the highest court of appeal for criminal matters. *About the High Court*, SCOTTISH COURTS AND TRIBUNALS, <https://www.scotcourts.gov.uk/the-courts/supreme-courts/high-court/about-the-high-court> (last visited Oct. 20, 2017).

51. Great Repeal Bill White Paper, *supra* note 48, ¶¶ 2.12–2.17.

legislation and continuing to follow EU case law after Brexit, whether or not as part of the negotiated settlement with the European Union, this seems unlikely for at least two reasons. First, it would leave British courts bound to passively follow the decisions of a legal system in which it no longer had input. Second, such an approach would seem to fly in the face of one of the key justifications for leaving the European Union in the first place, which is a desire to regain jurisdictional autonomy.<sup>52</sup> Supporting this conclusion, the Great Repeal Bill White Paper hints at no appetite for such an approach.<sup>53</sup>

Beyond the general courts, several other bodies make decisions with respect to intellectual property law in the European Union.

## 2. EUIPO—Trademarks and Designs

The EUIPO, which was, until March 26, 2016, known as the Office for Harmonisation in the Internal Market (OHIM), is located in Alicante, Spain. It is responsible for registering European Union Trade Marks (EUTMs)<sup>54</sup> and Registered Community

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52. See, e.g., *Why Vote Leave*, WHY VOTE LEAVE, [http://www.voteleavetakecontrol.org/why\\_vote\\_leave.html](http://www.voteleavetakecontrol.org/why_vote_leave.html) (last visited Oct. 20, 2017). On its “Why Vote Leave” page the Why Vote Leave campaign states, “[w]e can make our own laws; Our laws should be made by people we can elect and kick out—that’s more democratic.” *Id.* This would also fly in the face of commitments British Prime Minister May made in a keynote speech to the Conservative Party Conference on October 5, 2016, where she set out her “vision for Britain after Brexit.” Theresa May, British Prime Minister, Speech at Tory Conference (Oct. 5, 2016), <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html> [hereinafter *Vote Leave Campaign Speech*]. May stated, “let’s be clear about what is going to happen. . . . Our laws made not in Brussels but in Westminster. Our judges sitting not in Luxembourg but in courts across the land. The authority of EU law in this country ended forever. The people told us they wanted these things—and this Conservative Government is going to deliver them.” *Id.*

53. Great Repeal Bill White Paper, *supra* note 48.

54. Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks 2008 O.J. (L 299) 25 [hereinafter *Trademark Directive*]. This repealed Council Directive No. 89/104/EEC to approximate the laws of the Member States relating to trade marks. See also Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark (CTMR) 2009 O.J. (L 78) 1 (EC). Until March 23, 2016, EUTMs were called Community Trade Marks or CTMs. The name was amended by the EU Trade Mark Regulation. See Council Regulation 2015/2424 O.J. (L 341) 21 (EU).

Designs (RCDs).<sup>55</sup> These both provide for unitary rights with effect throughout the European Union, which are enforceable in domestic courts.

Trademark and design registration decisions made by EUIPO examiners can be appealed internally to EUIPO's Boards of Appeal. Its decisions can be appealed to the General Court, and in turn to the ECJ.

A hard Brexit would result in the EUIPO no longer registering trademarks or designs with application in Britain. Britain, in turn, would no longer be bound by decisions of EUIPO's Boards of Appeal or the ECJ.

Subject to agreement by Britain and the European Union, a softer Brexit may keep Britain within the EUIPO, in which case EUIPO registrations and decisions of the Boards of Appeal could remain applicable in Britain post-Brexit. While this would require changes to the EU laws constituting the EUIPO, it may be attractive to the European Union, as the EUIPO not only provides a relatively simple and cost-effective way of obtaining rights with effect throughout the European Union, but it is also a more useful system to intellectual property holders if its jurisdiction extends over Britain's large market.

The effect of such an arrangement, however, would be that trademarks and designs governed by EU law and under the jurisdiction of the ECJ would continue to apply in Britain. British courts would then presumably need to make judgments about EUTMs and RCDs in accordance with EU law. On the one hand, this might be considered acceptable despite Brexit, as rights-holders would choose to opt into the system, thus placing themselves under the jurisdiction of EU law for this limited purpose. On the other hand, this outcome might be unacceptable to those in Britain seeking independence from EU law through Brexit, especially as respondents in EUTM and RCD cases would find themselves under the jurisdiction of EU law regardless of their preferences, an outcome which would seem directly contrary to what Brexit is designed to achieve.

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55. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs 1998 O.J. (L 289) 28 [hereinafter Design Directive]; European Council Regulation 6/2002 of 12 December 2001 on Community Designs, 2002 O.J. (L 3) 1 (EC). [hereinafter Design Regulation].

Britain's Chartered Institute of Trade Mark Attorneys (CITMA) has mapped out multiple scenarios as to how registered EU rights could be protected post-Brexit.

With respect to trademarks, CITMA has proposed seven options.<sup>56</sup> These are: a 'UK Plus' model, in which the EUTM system is extended to cover all EU countries plus Britain, (and possibly other jurisdictions, such as countries such as Norway, Switzerland, and EU candidate countries); a 'Jersey' model in which Britain treats EUTMs as though they automatically apply to British territory; a 'Montenegro' model in which Britain would automatically enter all EUTMs onto its domestic register as national registered trademarks, with the same registration date and scope of protection as the corresponding EUTM held, and also the same priority and seniority if relevant; a 'Tuvalu' model that would operate like the Montenegro model, except that EUTM rights-holders would have to make a positive choice to extend their rights to Britain (e.g., by completing a form by a certain date); a 'veto' option that would operate like the Tuvalu model, but the British Intellectual Property Office (UKIPO) would retain a right to veto the transfer of registrations to national trademarks (e.g., if the UKIPO had previously refused a registration for this mark, or if the mark was not otherwise registrable in Britain under absolute grounds); the 'Republic of Ireland' option in which holders of EUTMs are given the option of having their rights placed on the British register as national registered trademarks at the time of renewal or up until a particular cut-off date, with EUTMs continuing to protect the designs in Britain during the interim period; and a 'conversion' model in which EUTMs could be converted into British national trademarks while retaining their EUTM application date and continuing to exist as EUTMs, but where registration in Britain would be dependent on passing a full examination by the UKIPO.<sup>57</sup> CITMA concludes: "Each scenario has particular strengths and weaknesses. For example, the 'EU plus' scenario has many benefits, but its key weakness is that it would require the agreement

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56. *EU Registered Rights—Trade Marks*, CITMA (Aug. 19, 2016), [https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_trade\\_marks](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_trade_marks). This document was expanded upon in a further document: *Tuvalu and Montenegro Scenarios*, CITMA (Jan. 27, 2017), [https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_trade\\_marks\\_-\\_depth](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_trade_marks_-_depth).

57. *Id.*



of the EU/EUIPO, whereas the other scenarios could be adopted unilaterally by the UK.”<sup>58</sup>

With respect to designs, novelty requirements would normally prevent the registration in Britain of a previously registered design.<sup>59</sup> If lack of novelty would prevent registration of national designs in Britain by RCD holders, other transitional arrangements may be necessary to allow equivalent British domestic rights to be obtained. CITMA has proposed six options.<sup>60</sup> These are: a ‘UK Plus’ model, in which the RCD system is converted into a European design system that covers both the EU and Britain; a ‘Jersey’ model in which Britain treats RCDs as though they apply to British territory; a ‘Montenegro’ model in which Britain would automatically enter all RCDs onto its domestic register as national registered designs, with the same registration date and scope of protection as the corresponding RCD held; a ‘Tuvalu’ model that would operate like the Montenegro model, except that RCD rights-holders would have to make a positive choice to extend their rights to Britain (e.g., by completing a form by a certain date); a ‘veto’ option in which RCD rights-holders can choose to have their rights placed on the British register as national registered designs, but the UKIPO retains a right of veto; and the ‘Ireland’ option in which RCD rights-holders are given the opportunity to have their rights placed on the British

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58. *EU Registered Rights—Trade Marks*, *supra* note 56.

59. Exceptions to this principle apply for Paris Convention applications. Article 4(A)(1) states:

Any person who has duly filed an application for . . . an industrial design . . . in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

Paris Convention, *supra* note 31, art. 4(A)(1). Art.4(C)(1) states: “The periods of priority referred to above shall be . . . six months for industrial designs. . . .” *Id.* art. 4(C)(1).

60. *EU Registered Rights—Designs*, CITMA (Aug. 19, 2016), [https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_designs](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_designs). This document was expanded upon. *See Tuvalu and Montenegro Scenarios*, CITMA (Jan. 27, 2017), [https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_designs\\_-\\_depth](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_designs_-_depth).

register as national registered designs when they are due for renewal, with RCDs continuing to protect the designs in Britain during the interim period.<sup>61</sup>

Ultimately, if considered independently of non-intellectual property issues that will be negotiated due to Brexit, decisions about the future of Britain within the EUIPO framework and/or the future of EUIPO-registered rights in Britain are likely to depend on pragmatic decisions about political costs and what is likely to produce the best outcome for the British and EU economies. If Britain leaves the European Union before these issues have been finalized, it will be important that transitional arrangements are put in place to cover any period between Brexit and the conclusion of an FTA (or other agreement addressing intellectual property issues) between Britain and the European Union. A precedent for transitional provisions was created after Ireland separated from Britain in 1921 and established its own intellectual property laws in 1927.<sup>62</sup> Even if it means acting unilaterally to avoid interim problems, it is recommended that Britain should implement a similar system following Brexit to, at least, recognize priority dates for existing EU registrations. It should arguably also, either, apply EU registrations directly within Britain, or allow a transitional period within which EU rights holders could apply for conversion of their interests to national British rights or make a national application based on earlier EU registrations.

### 3. EPO & UPC—Patents

The European Patent Office (EPO) is an administrative office within the intergovernmental European Patent Organisation, whose jurisdiction stems from the European Patent Convention (EPC).<sup>63</sup> A centralized European patent application can be made to the EPO, nominating any, some, or all of the thirty-eight signatory states in which the applicant seeks registration. If granted, the registration is issued as a “bundle of nationally enforceable patents” in all relevant signatory states. All twenty-

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61. *Id.*

62. Industrial and Commercial Property (Protection) Act (Act No. 16/1927) (Ir.).

63. Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, at 656, <https://www.epo.org/law-practice/legal-texts/epc.html>.

eight EU Member States are signatories to the EPC, but membership is not exclusive to EU Member States. For example, Turkey and Albania are both EPO members but are not (yet) part of the European Union. Britain could likewise remain within the EPO framework despite Brexit.

Registration decisions of examiners at the EPO can be appealed internally to its Boards of Appeal. The EPO is independent of the European Union, meaning its registration decisions are final and appeals cannot be made to EU courts. This should largely insulate existing patent arrangements from Brexit repercussions. As grants by the EPO create national patents, infringement proceedings are litigated in national courts. Post-Brexit, the EPO will continue to be able to grant British patents that are enforceable through British courts, and national patents that are enforceable by the domestic courts of remaining EU Member States.

A curious situation will exist with respect to the new Unitary Patent and Unified Patent Court, which are collectively known as the Unitary Patent system. These are due to come into effect in early 2018,<sup>64</sup> prior to Brexit, with Britain as a member state. Indeed, British ratification of the UPC Agreement<sup>65</sup> is necessary

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64. At the time of writing, the UPC website predicts the UPC will commence in "early 2018." *Final Preparatory Committee Signals State of Readiness*, UNIFIED PATENTCT. (Mar. 15, 2017), <https://www.unified-patent-court.org/faq/entry-force-and-preparatory-work>.

65. European Council Agreement on a Unified Patent Court 2013/C, 2013 O.J. C 175/01, 28. [hereinafter UPC Agreement].

for the system to commence.<sup>66</sup> Britain has signaled its intent to ratify this agreement, despite having triggered Article 50.<sup>67</sup>

Once the Unitary Patent system becomes operational, the EPO will assume responsibility for registering ‘European patents with unitary effect’ (EPUes or Unitary Patents) throughout all signatory jurisdictions of the UPC Agreement. Initially, this will

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66. *Id.* Under the UPC Agreement, the system will come into force on the first day of the fourth month after the UPC Agreement has been signed and ratified by thirteen Member States (including France, Germany, and the United Kingdom), and amendments to the Brussels I Regulation to accommodate the UPC have come into effect. *Id.* art. 89(1). While official documentation is not available at the time of writing, legal media reports that a constitutional challenge to UPC ratification was made to the Federal Constitutional Court of Germany (Bundesverfassungsgericht or BVerfG) by Düsseldorf attorney Dr Ingve Stjerna in May 2017. This case (No. 2 BvR 739/17) may put ratification of the UPC by Germany in question. *See, e.g., Complainant Against UPC Ratification in Germany Confirmed as Ingve Stjerna*, IPKAT (Sept. 7, 2017), <http://ipkitten.blogspot.com/2017/09/update-complainant-against-upc.html>. The UPC Chair, Alexander Ramsay, has issued a statement that:

Under the current circumstances it is difficult to maintain a definitive starting date for the period of provisional application. However, I am hopeful the situation regarding the constitutional complaint in Germany will be resolved rather quickly and therefore I am hopeful that the period of provisional application can start during the autumn 2017 which would mean that the sunrise period for the opt out procedure would start early 2018 followed by the entry into force of the UPCA and the UPC becoming operational.

*A Message from the Chairman, Alexander Ramsay—June 2017*, UNIFIED PATENT CT. (June 27, 2017), <https://www.unified-patent-court.org/news/message-chairman-alexander-ramsay-june-2017>.

67. *EPO President Welcomes UK Decision to Ratify UPC Agreement*, EUR. PATENT OFF. (Nov. 29, 2016), <https://www.epo.org/news-issues/news/2016/20161129.html>. One view is that this decision signals an intention by Britain to pursue a soft Brexit, at least with respect to patent law: Luke McDonagh, *UK is Heading for ‘Soft’ Brexit—Support for New EU patent Court Proves It*, CONVERSATION (Nov. 29, 2016), <https://theconversation.com/uk-is-heading-for-soft-brex-it-support-for-new-eu-patent-court-proves-it-69574>.

extend to all EU Member States<sup>68</sup> except Croatia,<sup>69</sup> Poland,<sup>70</sup> and Spain.<sup>71</sup> As with existing EPC applications, the EPO will apply EPC rules and procedures when assessing patentability and validity standards for Unitary Patent applications.

Meanwhile, the Unified Patent Court will have specialized patent jurisdiction in all signatory states of the UPC Agreement, and it is planned that the life sciences seat of the UPC will be in London. Britain has keenly supported the establishment of the UPC, which is intended to simplify and reduce the costs associated with patent litigation. Instead of patent disputes needing to be litigated separately in the domestic courts of each Member State in which they arise, litigation concerning affected European patents can be heard in a single case before the UPC. As patent filing statistics place the EPO and the UKIPO among the top receiving offices worldwide for patent applications,<sup>72</sup> it stands to reason that the UPC will be more attractive to, and useful for, patent holders if Britain remains part of the system.

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68. For an explanation of why only EU Member States are involved in the UPC, see Court of Justice of the European Union, Press Release No. 17/11 (Mar. 8, 2011), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017en.pdf> (discussing ECJ Opinion 1/09 of 8 March 2011, which ruled that an earlier plan to create a 'European Patents Court' involving other EPC members was incompatible with EU law). See also Opinion 1/91 of the Court, 1991 E.C.R. I-6084; Opinion 1/00 of the Court, 2002 E.C.R. I-3493.

69. Croatia was not a signatory to the UPC Agreement because it joined the European Union after work towards the Unitary Patent and UPC was already well underway.

70. Poland adopted a "wait and see" approach to the Unitary Patent and UPC. *Will Poland Join the Unitary Patent System?*, WORLD INTELL. PROP. REV. (Feb. 5, 2013), <http://www.worldipreview.com/news/will-poland-join-the-unitary-patent-system>.

71. Spain opposed the Unitary Patent package and challenged the two unitary patent regulations proceedings before the CJEU. Opinion of Advocate General Bot, Kingdom of Spain v. Council of European Union, Case C-147/13, 2014 E.C.R. 1; Kingdom of Spain v. Council of the European Union, Case C-146/13, 2015 E.C.R. 2. These applications were lodged in late 2013 and dismissed on May 5, 2015. *Id.*

72. *WIPO Facts and Figures 2016*, WORLD INTELL. PROP. ORG. 11 (2016), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_943\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2016.pdf) (showing the EPO as the fifth largest recipient of patent applications worldwide, accounting for 5.5 percent of all applications); *Patent Cooperation Treaty Yearly Review: The International Patent System*, WORLD INTELL. PROP. ORG. 26 (2016), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_901\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2016.pdf) (showing the EPO as the third largest recipient of PCT filings, and the UKIPO as the seventh largest recipient of PCT filings).

Will users, however, rely on the Unitary Patent System for patent protection in Britain when Britain's continuing membership of the UPC remains in doubt?

It is uncertain whether Britain will remain a member of the UPC post-Brexit. In a House of Commons General Committee Debate concerning the Unitary Patent and UPC, which occurred several months prior to the Brexit referendum, the Minister for Culture and the Digital Economy, Edward Vaizey, explained that after a vote to Brexit, "it would be a decision for the UK Government whether they wanted to rejoin the European patent court. Of course, we would have to rely on our European partners to decide whether the UK could be a member."<sup>73</sup> As the Unitary Patent and UPC obviously have greater reach if they extend to Britain, it seems likely that other UPC Agreement signatories would probably want to allow Britain to remain in the system. If so, whether or not Britain remains in the Unitary Patent and UPC is likely to depend on whether Britain is prepared to have this area of patent law governed by EU law post-Brexit, and whether amendments to the system's establishing instruments can be settled to allow membership by a non-EU Member State.

The UPC is being established by international agreement<sup>74</sup> and, in this respect, it is independent of the CJEU. The UPC, however, will apply EU law<sup>75</sup> and make preliminary references to the CJEU, whose decisions will be binding on the UPC.<sup>76</sup>

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73. House of Commons General Committee, Draft Patents (European Patent with Unitary Effect and Unified Patent Court) Order 2016, at 7, <https://www.publications.parliament.uk/pa/cm201516/cmgen-eral/deleg4/160301/160301s01.htm>.

74. UPC Agreement, *supra* note 65. For implementation in the EU, see Council Regulation No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection 2012 O.J. L 361) 1–8, and Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements 2012 O.J. L 361) 89–92.

75. UPC Agreement, *supra* note 65, art. 20. Article 20 states that: "The Court shall apply Union law in its entirety and shall respect its primacy." *Id.*

76. UPC Agreement, *supra* note 65, art. 21. Article 21 states that:

As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in

On one view,<sup>77</sup> it would therefore be contradictory for Britain, which has insisted that an important reason for Brexit is sovereignty over national laws, to remain part of the UPC post-Brexit. Unitary Patent applicants would be opting into the system and would therefore choose to be governed by the law of the European Union in their patent applications. If they were to appeal to the UPC on matters of registerability and/or opposition, they would similarly be opting into the system and would be choosing to be governed by the law of the European Union. Infringement cases, however, would be more problematic. As discussed above with respect to EUTMs and RCDs, the possibility that, regardless of their preferences, respondents in Unitary Patent infringement cases before the UPC would find themselves governed by EU patent laws post-Brexit, might be unacceptable to those in Britain seeking independence from EU law.

An alternative view<sup>78</sup> is that Britain would be ceding jurisdiction over some patents to the UPC, which is an international court existing outside the EU (albeit a court applying EU law), not to the European Union. Ceding jurisdiction to an international court would not be unprecedented, as Britain has already done so with respect to the United Nation's International Court of Justice,<sup>79</sup> the International Criminal Court,<sup>80</sup> and the WTO's Appellate Body.<sup>81</sup> On this view, there would be no inconsistency between membership of the UPC and the stated Brexit position of removing CJEU jurisdiction in Britain, as the CJEU would not have jurisdiction over the UPC.

Several commentators have suggested ways in which Britain's ongoing participation in the UPC could be organized post-

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particular. Decisions of the Court of Justice of the European Union shall be binding on the Court.

*Id.*

77. Paul Kavanagh et. al., *UK to Submit to Primacy of EU Law? . . . Maybe for Patents*, DECHERT LLP (Mar. 31, 2017), <http://www.lexology.com/library/detail.aspx?g=70c764c8-2b7f-4bc9-abb0-aba596481227>.

78. See Darren Smyth, *The UPC After Brexit—is CJEU Jurisdiction a Deal-Breaker?*, IPKAT (Apr. 4, 2017), <http://ipkitten.blogspot.nl/2017/04/the-upc-after-brexit-is-cjeu.html>.

79. U.N. Charter arts. 92–96.

80. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

81. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

Brexit.<sup>82</sup> In essence, these approaches would require variations of an approach involving amendments of the UPC Agreement, as well as the conclusion of a separate agreement between Britain and the participating states of the EPC that would extend the unitary effect of a Unitary Patent to Britain. As this agreement would be governed by international law,<sup>83</sup> Britain would remain removed from EU law, even though that law would be applied with respect to the Unitary Patent.

It is conceivable that Britain could find itself excluded from the UPC if Brexit occurs before a post-Brexit arrangement with respect to the Unitary Patent and UPC has been concluded. If so, and if Britain wants Unitary Patents to continue to be enforceable in its territory in the immediate aftermath of Brexit, establishing a recognition system for UPC judgments may provide an interim solution when cases have been heard before one of the UPC's European seats. It may also be possible to have UPC judgments enforced in British courts through ongoing post-Brexit adoption in Britain of the EU's Brussels Regime concerning recognition and enforcement of judgments in civil and commercial matters,<sup>84</sup> or through general private international law

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82. See, e.g., Ansgar Ohly, Chair of Civil Law, Intellectual Property and Competition Law at LMU Munich, Presentation at the European Patent Judges Forum: UPC and the impact of Brexit – Way forward? (Nov. 28, 2016). Richard Gordon QC & Tom Pascoe, *Opinion: Re the Effect of 'Brexit' on the Unitary Patent Regulation and the Unified Patent Court Agreement*, CHARTERED INST. PATENT ATT'YS (Sept. 12, 2016), <http://www.cipa.org.uk/EasySiteWeb/GatewayLink.aspx?aId=10869> (an analysis by British barristers, instructed by the IP Federation, CITMA and the Intellectual Property Lawyers Association); Winfried Tilmann, *The Future of the UPC After Brexit*, HOGAN LOVELLS, <http://www.theunitarypatent.com/the-unitary-patent-regulation-and-upc-agreement-after-brexit> (last visited Apr. 20, 2017); Wouter Pors, *The Unified Patent Court – Back on Track Again*, BIRD & BIRD (Nov. 29, 2016), <https://www.twobirds.com/en/news/articles/2016/global/unified-patent-court-back-on-track-again>; John Pegram, *UK and UPC: A Test of Compatibility*, WORLD INTELL. PROP. REV. (Feb. 28, 2017), <https://www.worldipreview.com/contributed-article/uk-and-upc-a-test-of-compatibility>.

83. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

84. While it remains in the European Union, Britain is bound by the Brussels Regime on the recognition and enforcement of judgments. See Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2001 O.J. (L 12) 1 (EC), recast by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and



principles. This would, however, leave a gap with respect to disputes over Unitary Patent infringements within British territory.

Under the long-established common law *Moçambique* rule,<sup>85</sup> English courts have traditionally placed self-imposed limits on subject-matter jurisdiction over title to or possession of foreign immovables. This has been interpreted as including patents, which are statutory creations of foreign governments.<sup>86</sup> It could,

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enforcement of judgments in civil and commercial matters. Following Brexit, Britain will cease to be part of this Brussels I Recast Regulation. The Great Repeal Bill could incorporate the Brussels I Recast Regulation into British domestic law, allowing continuity of the Brussels System within Britain (though, without any further agreement, there would be no obligation on the European Union to reciprocate). Otherwise, general conflict of laws principles concerning the recognition and enforcement of foreign judgments will apply.

85. *British South Africa Co v. Companhia de Moçambique* HL [1893] AC 602, 622.

86. In *Potter v. Broken Hill*, the High Court of Australia extended the 'act of state doctrine' to foreign patents. *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 498–89 (Austl.). According to this principle, adopted from the classic statement made by Fuller CJ in *Underhill v. Hernandez*:

Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). In *Lucasfilm Limited and others (Appellants) v. Ainsworth*, the Supreme Court stated:

Consequently the effect of the decision in *Potter v Broken Hill Pty Co Ltd* was to apply the *Moçambique* rule and, especially, the act of state doctrine to actions for patent infringement. It received no attention in the English case-law until it was mentioned by Lord Wilberforce in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508, 536 as authority for the proposition that the *Moçambique* rule applied in Australia. It was only from the 1980s that it came to be regarded as a significant authority in the field of transnational intellectual property litigation: *Def Lepp Music v Stuart-Brown* [1986] RPC 273; *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75 (both copyright cases).

*Lucasfilm v. Ainsworth* [2012] 1 A.C. 208 (UK).

however, be argued that the principle should be distinguished with respect to Unitary Patents.

In the relatively recent case of *Lucasfilm v. Ainsworth*,<sup>87</sup> the Supreme Court identified a distinction between registrability and infringement of intellectual property rights, concluding that there is no bar to English courts accepting jurisdiction to hear cases alleging infringement.<sup>88</sup> That case involved copyright, and the Supreme Court specifically noted that it “is possible to see how the rationale of the *Moçambique* rule can be applied to patents, at any rate where questions of validity are involved.”<sup>89</sup> Nonetheless, analogies between copyright and Unitary Patents, as well as concomitant distinctions between national patents and Unitary Patents, could arguably be drawn in at least two ways, each of which could extend the reasoning in *Lucasfilm* to the Unitary Patent, and allow British courts to exercise jurisdiction in Unitary Patent infringement cases.

First, cases involving national patents could be distinguished from Unitary Patents on the grounds that the territorially limited nature of national patents has traditionally meant that enforcement of foreign patents in Britain is an issue that would not

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87. *Lucasfilm v. Ainsworth*, [2012] 1 A.C. 208 (UK).

88. *Id.* [106]. The court stated:

All that is left of the *Moçambique* rule (except to the extent that it is modified by the Brussels I Regulation) is that there is no jurisdiction in proceedings for infringement of rights in foreign land where the proceedings are ‘principally concerned with a question of the title, or the right to possession, of that property. . . . [I]t is very difficult to see how it could apply to copyright.

*Id.* [106]–[107].

89. *Id.* [107]. The court stated:

The basis for what remains of the rule was said by the House of Lords in the *Moçambique* case to be that controversies should be decided in the country of the situs of the property because the right of granting it was vested in ‘the ruler of the country’ and in the *Hesperides* case to be the maintenance of comity and the avoidance of conflict with foreign jurisdictions. It is possible to see how the rationale of the *Moçambique* rule can be applied to patents, at any rate where questions of validity are involved.

*Id.*

likely have arisen.<sup>90</sup> By contrast, Unitary Patents cover British territory, as well as foreign territory. It is therefore arguable that the *Lucasfilm* principle distinguishing the *Moçambique* rule would allow English courts to hear cases involving infringements of Unitary Patents occurring in Britain. If so, English courts could exercise jurisdiction in Unitary Patent infringement cases post-Brexit, and this would raise no inconsistency with Brexit's goal of independence from EU law and the jurisdiction of the CJEU.

Second, there may be scope for British courts to treat Unitary Patents differently from the domestic patents of other nations, on the grounds that the former were created under an international agreement to which Britain was a party, whereas the latter are the legal creations of sovereign foreign governments. In this sense, Unitary Patents are perhaps more akin to copyright, which, when recognized to subsist in a member state of international treaties such as the Berne Convention<sup>91</sup> and the Universal Copyright Convention,<sup>92</sup> can be enforced in other Member States of those treaties according to a principle known as 'national treatment.' That international treaties establish the property rights associated with both Unitary Patents and foreign copyright underpins this analogy. The comparison is perhaps imperfect because, in copyright cases, national treatment means courts apply domestic laws when hearing cases alleging infringement within their jurisdiction. By contrast, British courts would apply EU law in cases alleging infringement within Britain of Unitary Patents. Nevertheless, this should not make a material difference to the question of whether Unitary Patents can be distinguished from domestic patents, and whether British courts would therefore be likely to exercise jurisdiction in cases involving allegations of infringement of a Unitary Patent in British territory.

As it is unclear whether Britain will remain in the UPC post-Brexit, or how British courts would apply the law with respect to Unitary Patents if Brexit were to occur before an agreement had been reached about Britain's post-Brexit relationship with

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90. For an examination of this issue in the U.S. context, see Amy Landers, *U.S. Patent Extraterritoriality within the International Context*, 36 REV. OF LIT. (2016), <http://www.thereviewoflitigation.org/36brief28/#r-8>.

91. See generally Berne Convention, *supra* note 32.

92. See generally Universal Copyright Convention, Sept. 6, 1952, 216 U.N.T.S. 133.

the Unitary Patent and UPC, it remains questionable how likely users are to rely on Unitary Patent protection in Britain. With the post-Brexit status of such patents subject to such uncertainty, it seems likely that many users will instead prefer to opt for the greater predictability of national patents for protection of their inventions within Britain.

#### 4. National Registry Offices and Courts

In addition to the pan-EU rights administered by the EUIPO and the EPO, national patents, designs, and trademarks are each issued by domestic intellectual property offices in EU Member States and enforced by the national courts of EU Member States, with ultimate appeal available to the CJEU. For the remaining EU Member States, Brexit should have no impact on these rights.

In Britain, the UKIPO is the national registry office for patents, designs, and trademarks. Based in Newport, Wales, the UKIPO will continue to examine applications for registered types of intellectual property post-Brexit, and the Great Repeal Bill makes it likely that EU patent, design, and trademark laws will be imported wholesale into British law and applied when the UKIPO is assessing applications. It remains to be seen how common law interpretations may lead to divergences from EU laws post-Brexit.

Pre-Brexit, national courts hold jurisdiction over areas of intellectual property such as copyright law subsistence and infringement, as well as design, trademark, and patent registrations and infringements. For the most part, this arrangement will remain unchanged following Brexit, though the substance of intellectual property laws being enforced by the courts may depend on the particular measures put in place to structure the Britain-EU intellectual property relationship post-Brexit. As noted above, common law interpretations may also lead to diverse evolutions of those laws in Britain and the European Union.

Unless other transitional arrangements are put in place, Brexit will render EUTMs, RCDs, and Unregistered Community Designs (UCD) invalid in Britain, and British courts will no longer have jurisdiction to determine cases involving EUTMs,

RCDs or UCDs.<sup>93</sup> This will leave holders of EUTMs, RCDs, and UCDs unprotected in Britain unless they can obtain equivalent domestic rights, enforcement of foreign judgments, or justiciability of EU laws in British courts.

#### IV. RESTRUCTURING INTELLECTUAL PROPERTY JURISDICTIONS: POST-BREXIT OPTIONS

The issues outlined above will clearly necessitate new intellectual property arrangements between Britain and the European Union post-Brexit. Intellectual property law, however, does not operate in a vacuum. As such, it is important to recognize that whatever arrangements are selected for the post-Brexit intellectual property relationship between the European Union and Britain are likely to have been influenced by unrelated considerations. While bargains may be made in which one area of interest is traded off for another, the nature of the international intellectual property structure, and the economic value to Britain and the European Union alike of an ongoing harmonized intellectual property relationship, suggest that an integrated intellectual property relationship post-Brexit is likely to be in both parties' best interests.

Intellectual property is one of many issues under consideration during Brexit negotiations, so the option that would be best vis a vis intellectual property may not be selected if other imperatives prevail. How negotiations may play out is unpredictable. Setting aside the risk of horse trading and surveying the issues only from the perspective of the European Union and British interests in maintaining a well harmonized intellectual property relationship, this Part will examine the options that Brexit negotiators are likely to consider. It will also refer to the EFTA and EEA, as several options involve membership of these organizations.

EFTA is a trade organization that creates a free trade area that is distinct from the European Union.<sup>94</sup> Its members are Iceland, Liechtenstein, Norway, and Switzerland, none of which are EU Member States. Britain was previously a member of EFTA,

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93. UCDs came into effect on March 6, 2002 and provide automatic unitary rights throughout the European Union when an eligible design is first published or used within the European Union. *Design Regulation*, *supra* note 55.

94. *See generally* Convention establishing the European Free Trade Association (Stockholm Convention), Jan. 4, 1960, 370 U.N.T.S. 3.

but withdrew when it joined the EEC, which later became the European Union.

A feature that has increased the integration of EU law beyond the EU's borders, and throughout Europe more generally, is the European Union's relationship with the EEA, a free trade organization that was formed in 1994. The EEA combines the European Union and most EFTA nations (except Switzerland) into a single or 'common market',<sup>95</sup> whose members adopt the EU's intellectual property *acquis*. It offers several options for structuring a post-Brexit relationship between the EU and Britain that is characterized by a high level of intellectual property harmonization.

A key EEA principle is that of 'regional exhaustion', under which an intellectual property holder's right to prevent importation of a product falls away once it has been placed on the market in the EEA. The result is that intellectual property products can be moved freely through the EEA once they have been placed on the market by, or with the consent of, a rights' holder. With 47 percent of British exports going to the European Union,<sup>96</sup> British business could face difficulties trading into the European Union if Britain was left outside the EEA following Brexit. A softer Brexit approach that kept Britain within the EEA and/or EFTA may alleviate this concern and therefore hold some appeal for the British negotiators.

Membership of the EEA, however, requires acceptance of the EU's core 'four freedoms' of free movement of capital, people, goods, and services throughout the European Union,<sup>97</sup> and the European Union has said it will not compromise on these central

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95. See Agreement on the European Economic Area, art. 65(2), 1994 O.J. (L 1) 3 [hereinafter EEA Agreement]. Article 65(2) states that: "Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services." *Id.*

96. HM REVENUE & CUSTOMS, UK OVERSEAS TRADE STATISTICS 3 (Aug. 2016), [https://www.uktradeinfo.com/Statistics/OTS%20Releases/OTS\\_Release\\_0816.pdf](https://www.uktradeinfo.com/Statistics/OTS%20Releases/OTS_Release_0816.pdf).

97. For the legal source and etymology of the term "four freedoms", see Thorsten Kingreen, *Fundamental Freedoms*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515, 515–516 (Armin von Bogdandy & Jürgen Bast eds., 2009).

principles.<sup>98</sup> It also seems unlikely, particularly given the prominence of immigration in the political campaign that culminated in a referendum outcome favoring Brexit, that British negotiators would agree to the ongoing free movement of people post-Brexit. A deadlock on this point could make ongoing British membership of the EEA unviable. Nonetheless, negotiators could possibly circumvent this hurdle by finessing the interpretation of “free movement” in relation to people (i.e., freedom in name, but not in practice). All possibilities should, therefore, be considered.

### A. *The Norway Option*

A compromise solution by which Britain would leave the European Union, but not the EEA, is colloquially dubbed “the Norway Option.” This would involve Britain rejoining the EFTA as a way of remaining in the EEA. As all EU Member States are required to apply to join the EEA, and the EEA also covers the non-EU EFTA states of Iceland, Liechtenstein, and Norway, the EEA Agreement has the effect of extending EU intellectual property law beyond the EU’s borders. While it does not extend to participation in the EUIPO framework,<sup>99</sup> membership of the EEA would offer an opportunity for Britain and the European Union to retain a greater level of intellectual property harmonization that would otherwise be likely to exist after Brexit.

Britain is currently a member of the EEA by virtue of its European Union membership. A potential route by which a post-Brexit Britain could remain within the EU’s intellectual property *acquis* may be for Britain to rejoin the EFTA when it leaves the European Union, thereby retaining the possibility of remaining within the EEA.<sup>100</sup> While this approach is likely to appeal to some British exporters, it may not be palatable in Britain more generally, as it would defeat some of the justifications for Brexit. For example, if it remained within the EEA, Britain would be

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98. For example, the EU’s chief Brexit negotiator, Guy Verhofstadt, has reportedly warned that splitting the four freedoms would “destroy the union and its internal market.” Charlie Peat, *EU Will Be Destroyed ‘If It Abandons Principles Over Brexit’*, *Brussels Negotiator Warns*, SUNDAY EXPRESS (Oct. 5, 2016), <http://www.express.co.uk/news/uk/717681/Guy-Verhofstadt-European-Union-EU-Brexit-destroyed-abandons-principles-Theresa-May>.

99. The EUIPO involves only EU states.

100. EEA Agreement, *supra* note 95.

obliged to implement the EU's single market laws without having contributed to making those rules. Britain would also lose some autonomy, as it would remain subject to EU legislation and be within the jurisdiction of the EFTA Court. It would also continue to have to make contributions to the EU budget.<sup>101</sup> Given the emphasis that Britain has placed on its post-Brexit independence,<sup>102</sup> acceptance of such conditions seems unlikely.

Moreover, a post-Brexit Britain may not be welcome back into the EEA and/or EFTA. The President of the EFTA's current chair, Iceland, has reportedly said his country would welcome Britain back into the EFTA post-Brexit,<sup>103</sup> but Norwegian politicians have given mixed messages about whether their country might veto such an application.<sup>104</sup> It may therefore be that Britain could not gain re-entry into the EFTA.

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101. Modelling by one think-tank has estimated Britain would continue to pay the majority of its pre-Brexit budgetary contribution to the European Union under the Norway approach. Nicholas Watt, *EU Exit: 'Norway option' Would Leave UK With 94% of Current Costs*, GUARDIAN (Mar. 16, 2015), <https://www.theguardian.com/politics/2015/mar/16/eu-exit-norway-option-costs-thinktank>.

102. Lancaster House Speech, *supra* note 19.

103. See Rachel Middleton, *Iceland Says It Would Welcome the UK into the European Free Trade Association Post-Brexit*, INT'L BUS. TIMES (Oct. 20, 2016), <http://www.ibtimes.co.uk/iceland-says-it-would-welcome-uk-into-european-free-trade-association-post-brexit-1587272>; *Iceland Wants UK To Join Nordic Alliance Of Non-EU Countries*, RT (Jun. 30, 2016) <https://www.rt.com/business/349008-iceland-uk-northern-union/>; Rosemary Belson, *Icelandic Foreign Minister to UK: Please Join EFTA*, POLITICO (July 9, 2017), <http://www.politico.eu/article/icelandic-foreign-minister-to-uk-please-join-efta/>; Szu Ping Chan, *Iceland Opens Door for UK to Join EFTA*, TELEGRAPH (July 15, 2017), <http://www.telegraph.co.uk/business/2017/07/15/iceland-opens-door-uk-join-efta/>.

104. Patrick Wintour, *Norway May Block UK Return to European Free Trade Association*, GUARDIAN (Aug. 9, 2016), <https://www.theguardian.com/world/2016/aug/09/norway-may-block-uk-return-to-european-free-trade-association>; Joachim Dagenborg, *Norway's PM Softens Stance on Britain Joining EFTA*, REUTERS (Aug. 18, 2016), <http://www.reuters.com/article/us-britain-eu-efta/norways-pm-softens-stance-on-britain-joining-efta-idUSKCN10T1E0>; Belinda Robinson, *Norway's EU Warning to UK: Joining EFTA Would Mean 'Binding Decisions Imposed' on Britain*, EXPRESS (Aug. 15, 2017), <http://www.express.co.uk/news/world/841209/Norway-Erna-Solberg-Theresa-May-Brexit-joining-European-Free-Trade-Association>; Ida Akerstedt, *Norway CAN'T Stop Britain Joining EFTA After Brexit—'UK is Our Ally, We Can't Say No!'* EXPRESS (Sept. 11, 2017), <http://www.express.co.uk/news/world/852607/Brexit-news-latest-EU-EEA-EFTA-Norway-model-deal-David-Davis-European-Union>.



Even if Britain were to retain membership of the EEA, not all EU intellectual property rules have been incorporated by that organization.<sup>105</sup> The EFTA website explains that this is “primarily due to two-pillar issues related to the granting and enforcement of rights. Other reasons for non-incorporation include acts dealing with third country relations or acts that pertain to policy areas falling outside the scope of the EEA Agreement.”<sup>106</sup>

If, despite these obstacles, the Norway Option were to be applied, the practical effect on intellectual property arrangements is likely to be that the European Union and British laws would be slightly less harmonized post-Brexit than before, but would nonetheless remain highly harmonized. This is reportedly the approach the European Union has favored in the immediate aftermath of Britain triggering Article 50.<sup>107</sup>

### *B. The Swiss Approach*

If Britain were unwilling or unable to retain EEA membership post-Brexit, precedent exists for an alternative method of a non-EU state participating in some aspects of the EU’s intellectual property *acquis*. This would involve Britain rejoining the EFTA, but not the EEA, and negotiating agreements with the European Union to govern relations post-Brexit.

A 1992 referendum in the EFTA’s fourth current member, Switzerland, rejected ratification of the EEA Agreement. Switzerland, however, has since concluded a series of bilateral agreements with the European Union<sup>108</sup> and has increasingly

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105. Council Regulation (EC) No. 612002 creating a Community Design System and Council Regulation (EC) No. 40194 creating a Community Trademark System have been excluded. See ICELAND MINISTRY FOR FOREIGN AFFAIRS, *Negotiating Position of Iceland*, INTERGOVERNMENTAL CONF. ON THE ACCESSION OF ICELAND TO THE EUR. UNION ch. 7 (2010), [http://www.mfa.is/media/ESB/samningskaflar/07/NegPosICEch7\\_FINAL.pdf](http://www.mfa.is/media/ESB/samningskaflar/07/NegPosICEch7_FINAL.pdf).

106. *Intellectual Property Rights*, EUR. FREE TRADE ASSOC. (2014), <http://www.efta.int/eea/policy-areas/goods/competition-aid-procurement-ipr/ipr>.

107. Simon Marks & Hans von der Burchard, *Brussels’ Brexit Plan: Treat the UK like Norway*, POLITICO (Apr. 18, 2017), <http://www.politico.eu/article/eu-brussels-suggests-norway-model-for-uk-after-brexit-talks-negotiations/>.

108. In addition to the earlier *Agreement between the European Economic Community and the Swiss Confederation* 22 July 1972, Switzerland and the European Union have concluded numerous treaties covering a variety of issues. *Switzerland*, EUR. COMM. (Feb. 22, 2017), <http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/>.

achieved harmonization with EU intellectual property laws through revisions of Swiss laws.<sup>109</sup> Switzerland has also introduced intellectual property laws compatible with EU laws concerning trademarks, neighboring rights and semiconductor topographies.<sup>110</sup> In addition, Switzerland is a member of the EPC, and it has entered into an agreement with the European Union for mutual respect of geographical indications.<sup>111</sup> Switzerland remains outside the EUIPO framework, but in other respects, its intellectual property laws are relatively well harmonized with the EU intellectual property *acquis*.

Even if it remained outside the EEA post-Brexit, Britain could seek a Swiss-style approach that would nevertheless enable it to maintain a high level of harmonization with EU intellectual property laws. Such an arrangement might well suit Britain better than the Norway Option, as one of the justifications for Brexit was a desire to control British laws.<sup>112</sup> Switzerland has arguably done this, and Swiss interpretations of the law have not always accorded with European Union understandings. For example, in 1979, the Swiss Federal Court rejected the notion of regional exhaustion, applying instead the principle of national exhaustion found in Swiss domestic law.<sup>113</sup> Twenty years later, the Court discussed at length the relationship between Swiss and EU intellectual property laws, noting differences in interpretation.<sup>114</sup>

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109. European Parliament Directorate General For Internal Policies Briefing Paper, Policy Department A: Economic and Scientific Policy, *Internal Market beyond the EU: EEA and Switzerland*, (European Parliament, Jan. 2010), PE 429.993, 24, <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf>.

110. Tritton & Davis, *supra* note 43, ¶¶ 1–62.

111. Agreement between the European Community and the Swiss Confederation on trade in agricultural products, EC and Switz., June 21, 1999, 2227 U.N.T.S. 199, 236, amended to incorporate Annex 12 (2011).

112. Lancaster House Speech, *supra* note 19; Vote Leave Campaign Speech, *supra* note 52.

113. Bosshard Partners Intertrading AG v. Sunlight AG [1980] 3 C.M.L.R. 664; Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil (GRUR Int) 1979, 569, [1980] 3 C.M.L.R. 664.

114. *Kodak AG v. Jumbo Markt AG* (1999), Bundesgericht [BGer] [Federal Supreme Court (First Division)] Dec. 7, 1999, [2001] [E.N.P.R.] 11 (Switz.). For a clear summary of this discussion, see Jarrod Tudor, *Intellectual Property, the Free Movement of Goods and Trade Restraint in the European Union*, 6 J. OF BUS., ENTREP. & THE L. 45, 61–63 (2012).

Harmonization of intellectual property laws has, therefore, been imperfect between Switzerland and the European Union. Yet, the degree of integration and engagement remains relatively high. If Britain would like to remain as harmonized as possible with EU intellectual property laws post-Brexit, but avoid the European Union actually controlling those laws, the Swiss Approach offers a method of achieving this goal.

*C. The Treaty Approach ("WTO Approach" or "Canada Approach")*

If Britain is neither a member of the EEA or EFTA post-Brexit, its exporters are likely to face tariffs and/or non-tariff barriers when trying to trade with the European Union. Therefore, one or more treaties will almost certainly be negotiated between the two jurisdictions. Media commentators are tending to dub this "the WTO Approach," as it is predicated upon the European Union and Britain both continuing to be WTO Member States and thus bound by the standardized legal requirements of WTO agreements, including the TRIPS Agreement. Elsewhere, this has been dubbed the "Canada Approach" (a term attributed to British Foreign Secretary Boris Johnson)<sup>115</sup> because the European Union has been negotiating a trade agreement with Canada for some years.<sup>116</sup> To avoid confusion, this option might more simply be named "the Treaty Approach."

WTO rules would require the European Union and Britain to continue affording each other *most favored nation* status,<sup>117</sup> while also granting each other's people *national treatment*<sup>118</sup> and

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115. Stephen Bush, *Can the UK Have a Deal with the EU Like Switzerland or Norway?* NEW STATESMAN (June 16, 2016), <http://www.newstatesman.com/politics/uk/2016/06/can-uk-have-deal-eu-switzerland-or-norway>.

116. This treaty is called the Comprehensive Economic and Trade Agreement (CETA) and will remove most tariffs between the European Union and Canada. European Commission Press Release, *EU-Canada Trade Agreement Enters into Force* (Sept. 20, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723>. Canada signed CETA on October 30, 2016 and it entered into force provisionally on September 21, 2017, but it must be ratified by national parliaments of Member States before it will take full effect. *Id.* Chapter 20 contains intellectual property provisions. EUR. COMM., *Ceta Chapter By Chapter*, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

117. This principle involves affording nationals of the recipient nation trading advantages that are at least as favorable as those given to any other trading partner.

118. See, e.g., Paris Convention, *supra* note 31, art. 2(1). This states:

*priority right* post-Brexit.<sup>119</sup> Mutual WTO membership would thus underpin a degree of trading freedom between Britain and the European Union.

Britain joined the WTO independently, becoming a member of its predecessor GATT (the General Agreement on Tariffs and Trade) on January 1, 1948, and it will remain a member after Brexit. The European Commission negotiates and enters international agreements on behalf of the EU Member States, and these will cease to apply to Britain post-Brexit. Therefore, Britain will need to negotiate new arrangements with nations, and the European Union, with which it would like to have trade agreements.<sup>120</sup> The WTO Director-General, Roberto Azevêdo, has described Britain's situation as unprecedented, foreshadowing a protracted and "tortuous" process in which Britain would have to renegotiate its trade commitments.<sup>121</sup>

As noted above, Britain can be expected to negotiate an FTA with the European Union to take effect post-Brexit,<sup>122</sup> and it is

Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals. . . . Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

*Id.*

119. *Id.* art. 4. Priority right allows a person who has filed in one jurisdiction to rely on the 'priority date' of the original filing as the relevant date in subsequent jurisdictions in which it files within a specified timeframe. For patents and designs, this is beneficial because the earlier filing does not defeat novelty.

120. The European Parliament has reportedly threatened to exclude Britain from EU trade discussions if it commences trade negotiations with non-EU nations prior to Brexit. Maïa de la Baume, *MEPs Threaten to Punish UK if it Starts Pre-Brexit Talks*, POLITICO (Mar. 30, 2017), <http://www.politico.eu/article/meps-threaten-to-punish-uk-if-it-starts-pre-brexit-talks/>.

121. Shawn Donnan, *WTO Warns On Tortuous Brexit Trade Talks*, FIN. TIMES (May 25, 2016), <https://www.ft.com/content/745d0ea2-222d-11e6-9d4d-c11776a5124d>; Larry Elliott, *WTO Chief Says Post-Brexit Trade Talks Must Start From Scratch*, GUARDIAN (Jun. 7, 2016), <https://www.theguardian.com/business/2016/jun/07/wto-chief-brexit-trade-talks-start-scratch-eu-referendum>.

122. A complication may be that, under EU rules, the European Union has the exclusive competence to conduct trade negotiations on behalf of its Member States. TFEU, *supra* note 26, art. 3. To avoid breaching EU law, Britain may

common for FTAs to include detailed intellectual property clauses.<sup>123</sup> In theory, but dependent on what is ultimately agreed, this would enable Britain and the European Union to maintain similar intellectual property arrangements to those currently in force. While it would necessitate some amendments to EU laws, an agreement between Britain and the European Union could conceivably be negotiated to enable Britain to remain a participant in EU intellectual property institutions, such as the EUIPO. Various issues would need to be addressed, such as the aforementioned risk of disparities in judicial interpretation. The flexibility of this approach, however, may ultimately allow the parties to negotiate a bespoke settlement that maintains maximum integration of European Union and British intellectual property arrangements.

## V. LOOKING FORWARD

“The brutal truth is that Brexit will be a loss for all of us . . . I am afraid that no such outcome exists that will benefit either side.”<sup>124</sup>

While European Council president Donald Tusk was referring to Brexit generally when he spoke those words, they seem particularly pertinent in the context of intellectual property arrangements in the European Union and Britain. Several factors may influence whether Brexit will, in hindsight, be judged to have benefitted Britain and/or the European Union with respect to intellectual property in the longer term. This Part will consider some of these factors and contemplate whether Brexit could ultimately lead to an expansion of the reach and influence of the EU's intellectual property *acquis*.

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therefore have to wait until after Brexit before it can enter into FTAs in its own right.

123. European Parliament Directorate-General for External Policies, Policy Briefing: *Does ACTA still matter? Protecting Intellectual Property Rights in International Trade*, EXPO/B/INTA/2013/26, ch. 3 (2013); Maximiliano Santa Cruz S., *Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries*, ch. 2 (ICTSD IPRs and Sustainable Development Issue Paper No. 20, International Centre for Trade and Sustainable Development, June 2007).

124. Tusk, *supra* note 27.

*A. Quarantining Brexit's Intellectual Property Negotiations*

One of the initial questions to be asked is: will intellectual property issues be determined on their own merits during Brexit negotiations? This raises strategic issues about how Britain and the European Union will negotiate post-Brexit intellectual property arrangements, and whether negotiations about these matters will be quarantined from considerations about other aspects of their post-Brexit relationship.

The European Union is in an awkward position. On the one hand, continuing to include Britain in as much of the pre-Brexit intellectual property *acquis* as possible would appear to be the best way for the European Union to continue to prosecute the goals originally voiced in the Schuman Declaration of 1950, which it has since pursued through its intellectual property harmonization project.

On the other hand, the European Commission president, Jean-Claude Juncker, has described Brexit as an “existential threat” to the European Union,<sup>125</sup> and EU leaders are anxious to deter copycat exits by other Member States and/or the possible disintegration of the European Union.<sup>126</sup> For this reason, EU negotiators will be keen to avoid rewarding, or being perceived to reward, Britain with an outcome that lets it benefit from Brexit when compared with its pre-Brexit position or the positions of Member States remaining within the European Union. Indeed, leaders of various EU Member States have been forceful in their insistence that Britain must not be permitted to pick and choose

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125. Peter Foster & James Rothwell, *Jean-Claude Juncker, the European Commission President, Suggests UK Will Not Have Access to Single Market After Brexit*, TELEGRAPH (Sept. 14, 2016), <http://www.telegraph.co.uk/news/2016/09/13/eu-facing-an-existential-threat-in-the-wake-of-brexit-jean-claud/>.

126. Member States that EU leaders fear might vote to leave the European Union are: Sweden, Denmark, Greece, the Netherlands, Hungary, and France. See: Rick Noack, *These Countries Could Be Next Now That Britain Has Left the E.U.*, WASH. POST (June 24, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/06/23/these-countries-could-be-next-if-britain-leaves-the-e-u/>.

which bits of EU membership it would like to jettison and retain.<sup>127</sup> Others have spoken about the need to punish Britain for deciding to leave the European Union.<sup>128</sup>

With respect to intellectual property law, such a hardline and inflexible approach might be shortsighted. First, populist decisions about whether to withdraw from the European Union are far more likely to be driven by issues such as nationalism, immigration, and/or grievance than intellectual property arrangements, which almost certainly have no influence on the decisions of the vast majority of voters. Second, if other Member States were to decide to leave and the European Union started to disintegrate, preserving a strong intellectual property *acquis* that encompasses as many countries as possible would be a key way of helping to maintain a *de facto* union between the European nations. It was “common foundations for economic development” that Schuman dreamed would unify Europe and create an integrated stable and peaceful continent.<sup>129</sup> The EU’s intellectual property *acquis* has become one of those foundations, and it could persist even if other aspects of the modern European Union were to fall away.

Thus, as much as possible, intellectual property aspects of post-Brexit arrangements should be negotiated on their own terms. The negotiators should be attentive to the constitutive structures of intellectual property laws and should be careful not to damage the internal coherence of those laws through horse-trading about other interests. Although such bargaining is common during trade negotiations,<sup>130</sup> both parties share common interests in the maintenance of a stable intellectual property

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127. Peter Walker, *Angela Merkel: Theresa May Cannot ‘Cherry Pick’ Brexit Terms*, INDEPENDENT (Dec. 6, 2016), <http://www.independent.co.uk/news/world/europe/brexit-angela-merkel-theresa-may-cannot-cherry-pick-terms-latest-eu-uk-a7458486.html>; David Phinnemore, *Why the UK Can’t Just Pick and Choose from the EU Menu After Brexit*, CONVERSATION (Sept. 14, 2016), <https://theconversation.com/why-the-uk-cant-just-pick-and-choose-from-the-eu-menu-after-brexit-64777>.

128. See, e.g., Chapman *supra* note 38; Cowburn, *supra* note 38.

129. Schuman Declaration, *supra* note 39.

130. For discussions of linkage bargaining in an intellectual property context, see generally MICHAEL PATRICK RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 12–13, 18, 92 (1998); Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT’L ECON. L. 535 (1998); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE

framework after Brexit occurs. Both the European Union and Britain are likely to enjoy mutual longer-term benefits if intellectual property laws are negotiated independently of other issues in the lead up to Brexit and if a seamless collaborative arrangement can be put in place post-Brexit.

### *B. Laying EU Foundations for Global Intellectual Property Harmonization?*

It is even conceivable that Brexit could open the door to new possibilities that, in due course, could give rise to a territorially larger, harmonized EU intellectual property system than before.

Global intellectual property harmonization has gone through the following various phases: the development of modern intellectual property concepts in Western Europe several hundred years ago, the transmission of those laws around the world through colonization, and the standardization of intellectual property principles in national laws across the world as jurisdictions signed up to treaty terms.<sup>131</sup> This trend has been described as Europe “shaping the global [intellectual property] regime in its own image, even if global rules are not a carbon copy of EU rules.”<sup>132</sup>

Within Europe, the trend has gone further, as the European Union has bit-by-bit harmonized intellectual property laws throughout twenty-eight separate nations. Ansgar Ohly comments that, “we have reached a stage where the re-nationalization of intellectual property law in Europe would cause prohibitive costs. There is no way back. . . .”<sup>133</sup> If Ohly is correct, it may be because so many powerful stakeholders benefit from the European Union’s harmonization of intellectual property laws, and

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GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); José E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT’L L. 146 (2002).

131. For discussions of this history, see, e.g., Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, UK Commission on Intellectual Property Rights Study Paper No. 8, 7–10 (2002), [www.iprcommission.org/papers/pdfs/study\\_papers/sp8\\_drahos\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf); Alexandra George, *The (In)Justice of Globalisation by Intellectual Property Harmonisation*, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 109, 17–31 (2007).

132. *Conclusion: The Role of the EU in the Legal Dimension of Global Governance*, in THE EU’S ROLE IN GLOBAL GOVERNANCE: THE LEGAL 325, 337 (Bart Van Vooren et al., 2013).

133. Ansgar Ohly, *Concluding Remarks: Postmodernism and Beyond*, in THE EUROPEANIZATION OF INTELLECTUAL PROPERTY LAW: TOWARDS A EUROPEAN LEGAL METHODOLOGY 255, 256 (Ansgar Ohly & Justine Pila, eds., 2013).



there is therefore a lack of political will to unwind levels of intellectual property protection in Europe. It may also reflect the enormous investment by governments and businesses alike that has been devoted to establishing the current system and operating within it.

This article does not advocate territorial expansion of the EU's intellectual property jurisdiction. The EU's intellectual property *acquis* has detractors, with strong critiques being made against various aspects of the EU's intellectual property laws. Rather than expansion of its scope, there are also intellectual property minimalists who would prefer to see a weakening of the layers of intellectual property laws that have come to cloak contemporary life in Europe and around much of the globe.<sup>134</sup> The political reality, however, is that twenty-first century governments throughout Europe, and in much of the rest of the world, have tended to be broadly supportive of intellectual property laws, with the European Union also strongly promoting this agenda. While some treaties with intellectual property provisions have fallen by the wayside,<sup>135</sup> the number of state signatories to intellectual property-specific treaties has generally been increasing, not falling, and there has been a trend towards including intellectual property chapters in bilateral and multilateral trade agreements (e.g., FTAs) and investment treaties. Despite opponents, the standardization of intellectual property laws throughout the European Union and the rest of the world has been growing steadily as a result of governmental decisions.

Against this backdrop, it makes practical sense for states to design their intellectual property laws and bureaucracies to be

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134. For a discussion of the intellectual property minimalist/maximalist positions, see, e.g., Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*. (PIJIP Research Paper No. 15. 2010), <http://digitalcommons.wcl.american.edu/research/15/>; Peter Yu, *Intellectual Property and the Information Ecosystem*, MICH. ST. L. REV. 1 (2005).

135. Examples include the Anti-Counterfeiting Trade Agreement (ACTA), which was signed by numerous nations in 2011 and 2012, but which has failed to reach the required six ratifications to come into effect, and the Trans-Pacific Partnership Agreement (TPP or TPPA), which was signed by many nations, but which the U.S. has withdrawn from in 2017, and which has only been ratified by Japan. See, e.g., Stephanie Anderson, *TPP: Government Scrambles to Salvage Trans-Pacific Partnership after Donald Trump Pulls US Out*, ABC (Jan. 24, 2017), <http://www.abc.net.au/news/2017-01-24/donald-trump-tpp-federal-government/8207250>.

as competitive, and as attractive to users, as possible. It is plausible that considerations, such as the high costs of running administrative bodies and the efficiencies gained from larger jurisdictions, might prompt some nations to take steps towards harmonizing their intellectual property systems.<sup>136</sup>

If Britain is able to remain, *de jure* or *de facto*, within all or part of the EU's intellectual property *acquis* post-Brexit, a precedent will be set that indirectly harmonizes intellectual property laws inside the European Union and beyond. This might forge a path that ultimately allows other non-EU nations to participate in a similar manner, thus resulting in a creeping harmonization of EU intellectual property laws beyond the European Union. Might Brexit, therefore, be the harbinger of a new era of intellectual property globalization?

### *C. Precedents for Harmonization via Supra-Territorial Registries*

A limited type of international harmonization has long occurred when nations have shared aspects of intellectual property bureaucracies.

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136. Various examples of international intellectual property harmonization projects can be found. These include, first, discussions between Australia and New Zealand to harmonize trademark and/or patent laws: *see, e.g., Australia and New Zealand in Talks to Harmonize IP*, MANAGING INTEL. PROP. (Dec. 19, 2014), <http://www.managingip.com/Article/1258602/Australia-and-New-Zealand-in-talks-to-harmonize-IP.html>; SUSY FRANKEL & MEGAN RICHARDSON, *Trans-Tasman Intellectual Property Coordination*, in LEARNING FROM THE PAST, ADAPTING FOR THE FUTURE: REGULATORY REFORM IN NEW ZEALAND 527–553 (Susy Frankel ed. 2011); HOUSE OF REPRESENTATIVES, STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, HARMONISATION OF LEGAL SYSTEMS: WITHIN AUSTRALIA AND BETWEEN AUSTRALIA AND NEW ZEALAND ¶¶ 3.121–3.136 (The Parliament of the Commonwealth of Australia; Nov. 2006). A second example would be the cooperation between IP Australia and the USPTO, according to which the former acts as an international search and examination authority for international patent applications filed with the latter via the PCT. *See* Amanda Jones, *International report—Harmonisation: Are We One Step Closer?*, INT'L ASSET MGMT. (Aug. 13, 2008), <http://www.iam-media.com/reports/detail.aspx?g=3a4ff152-d5aa-4538-8fb0-894a8aeaac50>. A third example would be a proposal by Adrian Sterling to harmonize copyright laws throughout the Asia-Pacific region with an Asian Pacific Copyright Code, which was the subject of the 2016 Asian Pacific Copyright Association Conference. Asian Pacific Copyright Code Proposal for Discussion, <https://drive.google.com/file/d/0B3Vaav-YAZ6RbkFLaUQ4aEYwMk0/view>.

The joint intellectual property office of the Benelux nations (BOIP)<sup>137</sup> and the Patent Office of the Cooperation Council for the Arab States of the Gulf<sup>138</sup> are examples of regional harmonization. These administrative offices grant rights that are valid in all participating states. Indeed, BOIP's role extends far beyond Europe, as it also implements the BES Trademarks Act<sup>139</sup> for the Caribbean Netherlands, comprising the three Dutch municipalities of Bonaire, Sint Eustatius, and Saba located in the Caribbean Sea.

Similarly, the 'outermost regions' (OMR) of the European Union are territories that may be located at some geographic distance from Europe, but that nonetheless remain part of the European Union. These include French Guiana, Guadeloupe, Martinique, Mayotte, Réunion, and the Collectivity of Saint Martin (all of which are part of France), the Canary Islands (Spain), and Azores and Madeira (parts of the Portuguese Republic). The OMR are governed by EU law, including the EU's intellectual property *acquis*.

A related example of international intellectual property harmonization is the mechanism of re-registration that remains from colonial times in some parts of the world. For instance, in the South Pacific region, which is half way around the world from Europe, French national trademark registrations apply if re-registered in New Caledonia, French Polynesia, and the Wallis & Futuna Islands,<sup>140</sup> while British trademark re-registrations apply in Kiribati, the Solomon Islands, and Tuvalu.<sup>141</sup>

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137. The Benelux Office for Intellectual Property covers Belgium, the Netherlands, and Luxembourg. See generally BENELUX OFF. FOR INTELL. PROP., <http://www.boip.int> (last visited Oct. 22, 2017).

138. The Patent Office of the Cooperation Council for the Arab States of the Gulf covers the States of United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar, and the State of Kuwait. See generally PATENT OFF. OF THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF, <http://www.gccpo.org/DefaultEn.aspx> (last visited Oct. 22, 2017).

139. *Trademarks Act for the BES Islands (Wet Merken BES)*, CARIBIE.NL, [http://www.caribie.nl/sites/www.caribie.nl/files/gebruiker10/afbeeldingen/2012.03.26-trademarks\\_act\\_for\\_the\\_bes\\_islands.pdf](http://www.caribie.nl/sites/www.caribie.nl/files/gebruiker10/afbeeldingen/2012.03.26-trademarks_act_for_the_bes_islands.pdf).

140. Tracey Berger, *Trade Mark Registration in the Pacific Islands*, SPRUSON AND FERGUSON INTELL. PROP. (Dec. 4, 2012), <http://www.spruson.com/trade-mark-registration-in-the-pacific-islands/>.

141. For details of the extension of British intellectual property rights to other territories, see EXTENSION OF UK INTELL. PROP. RTS. ABROAD, GOV.UK,

During the days of the British Empire, its patent re-registration system stretched to over thirty colonies around the world.<sup>142</sup> A proposed Empire Patent that would have covered all British colonies never eventuated,<sup>143</sup> but Peter Drahos has drawn an analogy between the Empire Patent and Europe's EPO,<sup>144</sup> which extends to thirty-eight Member States.

In the cases of joint intellectual property offices, of decisions of intellectual property offices on one side of the world applying directly to territories on the other side of the world, and of re-registration of rights, intellectual property agencies already make decisions that apply in jurisdictions beyond their territorial borders. Several precedents therefore exist for international harmonization-type projects in which an administrative office in one jurisdiction makes decisions with respect to intellectual property in multiple jurisdictions in different parts of the world.

#### *D. An Alternative to Top-Down Intellectual Property Harmonization Projects?*

Is it possible that the global harmonization of intellectual property laws via an expansion of the jurisdiction of EU laws in this area might succeed where earlier projects have failed?

Various proposals to internationally harmonize particular areas of intellectual property law have been mooted in the past, but have tended to fall by the wayside.

Perhaps the most ambitious project was an attempt to establish a world patent system. In 2001, the World Intellectual Property Organization's Standing Committee on the Law of Patents drafted a Substantive Patent Law Treaty (SPLT), but work on this project was put on hold in 2006 due to a lack of consensus.<sup>145</sup> Commenting on opposition to the SPLT proposal and challenges

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(July 25, 2017), <https://www.gov.uk/government/publications/extension-of-uk-intellectual-property-rights-abroad>.

142. Peter Drahos, *THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS* 142–143 (2010).

143. Christopher Wadlow, *The British Empire Patent 1901–1923: The 'Global' Patent That Never Was*, 4 *INTELL. PROP. Q.* (2006) 311–346.

144. Drahos, *supra* note 142, at 142.

145. *Draft Substantive Patent Law Treaty*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/patent-law/en/draft\\_splt.htm](http://www.wipo.int/patent-law/en/draft_splt.htm) (last visited April 24, 2017). See also Emma Barraclough, *Patent Harmonization Push by Developed World*, *MANAGING INTELL. PROP.* 10–11 (2004–2005).

posed by emerging technologies, Jerome Reichmann and Rochelle Cooper Dreyfuss argued that: “a deep harmonization would boomerang against even its developed country promoters by creating more problems than it would solve. There is no vision of a properly functioning patent system for the developed world that commands even the appearance of a consensus.”<sup>146</sup>

The SPLT was a top-down attempt by the few, notably the world's largest patent offices, the European Union, United States, and Japan, collectively known as the Trilaterals with respect to patent policy,<sup>147</sup> to produce a global patent system that would harmonize patent law for the many.<sup>148</sup> It attracted resistance.<sup>149</sup>

Some aspects of patent law have nonetheless become quite standardized through membership of the Patent Cooperation Treaty (PCT), which allows patent applicants to file a single international application to seek patents in up to 152 contracting states,<sup>150</sup> and the Patent Law Treaty (PLT), which harmonizes formal procedural requirements among thirty-nine contracting states.<sup>151</sup> In an environment in which administrative aspects of

146. Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L. J. 58 (2007).

147. For a discussion of the Trilaterals, see Drahos, *supra* note 142, ch. 6.

148. *Global Patents for World Domination?* GRAIN (Oct. 1, 2003), <https://www.grain.org/fr/article/entries/405-global-patents-for-world-domination>.

149. See, e.g., KSHITIJ KUMAR SINGH, BIOTECHNOLOGY AND INTELLECTUAL PROPERTY RIGHTS: LEGAL AND SOCIAL IMPLICATIONS 132–133 (2014); SANGEETA SHASHIKANT, THE SUBSTANTIVE PATENT LAW TREATY: THE DANGERS OF GLOBAL PATENT POLICY HARMONIZATION (2009); Philippe Baechtold & Tomoko Miyamoto, *International Patent Law Harmonization: A Search for the Right Balance*, 10 J. OF INTELL. PROP. RTS. 177 (May 2005); *One Global Patent System? WIPO's Substantive Patent Law Treaty*, GRAIN (Aug. 4, 2003), <https://www.grain.org/article/entries/109-one-global-patent-system-wipo-s-substantive-patent-law-treaty>; *WIPO Moves Toward “World” Patent System*, GRAIN (July 2002), <https://www.grain.org/article/entries/2116-wipo-moves-toward-world-patent-system>; Biswajit Dhar & R. V. Anuradha, *Substantive Patent Law Treaty: What It Means for India*, 40 ECON. & POL. WEEKLY 1346 (2005).

150. World Intellectual Property Organization, *PCT—The International Patent System*, <http://www.wipo.int/pct/en/> (last visited Oct. 22, 2017).

151. See generally *Summary of the Patent Law Treaty (PLT) (2000)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/ip/plt/>. For a list of contracting parties, see *WPO-Administered Treaties*, WORLD INTELL. PROP. ORG.,

patent law are already strongly harmonized under the PCT and PLT, and a degree of substantive legal standardization has developed under the TRIPS Agreement, some non-EU nations might find it efficient and/or pragmatic to piggyback on a strong existing patent registration system and thus avoid having to maintain domestic patent examination and registration infrastructure. Expansion of the Unitary Patent to non-EU nations could provide an opportunity to do this, while the addition of an international patent court, such as the prospective EPC, could make the system additionally attractive. Meanwhile, other nations would undoubtedly want to maintain the maximum flexibilities allowed to developing countries under TRIPS,<sup>152</sup> or would be unwilling to replace national patent principles with EU law, and would opt to stay outside the EU's TRIPS Plus framework.

Opening membership of its patent framework to non-EU nations could help the European Union achieve goals it had sought by promoting the SPLT. So long as sovereign nations were not put under pressure to join, for example, during FTA negotiations, it might attract less resistance because its existence would not depend on achieving consensus. That is, non-EU nations could choose to join if they wanted to comply with rules of the established system, or not join, according to their preference.

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[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=4](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=4) (last visited Oct. 22, 2017).

152. For a discussion of developing countries' use of flexibilities, see Florian Rabitz, *Explaining Institutional Change in International Patent Politics*, 35 THIRD WORLD Q. 1582 (2014).

Equivalent projects to the SPLT have not yet sought to harmonize trademarks,<sup>153</sup> design,<sup>154</sup> or copyright<sup>155</sup> law internationally. Similar considerations, however, would apply to these other areas of intellectual property law.

A discussion of the general pros and cons of global intellectual property harmonization is beyond the scope of an article on the implications of Brexit. Suffice it to say here that, while many would oppose what might be seen as neo-imperialism by the European Union through the expansion of its intellectual property

153. For discussions of global trademark harmonization, see Kenneth L. Port, *Trademark Harmonization: Norms, Names & Nonsense* 2 MARQ. INTELL. PROP. L. REV. 33 (1998); Marshall A. Leaffer, *The New World Of International Trademark Law* 2 MARQ. INTELL. PROP. L. REV. 1 (1998); Hugo Mock, *Is an International Trade-Mark Law Desirable Now*, 40 TRADEMARK REP. 3 (1950); Edward S. Rogers & Stephen P. Ladas, *Proposals for Uniform Trade-Mark Laws*, 40 TRADEMARK REP. 8 (1950).

154. For a discussion of global design law harmonization, see Susanna Monseau, *The Challenge of Protecting Industrial Design in a Global Economy* 20 TEX. INTELL. PROP. L.J. 495, 520 (2011–2012). This states that:

There are now four agreements and two organizations at the international level that are relevant to the protection of industrial design. None of them provide a completely agreed-upon international standard for the protection of design and their history illustrates the continuing conflict on many issues related to industrial design. However, despite the confusion and points of disagreement, some tentative areas of emerging harmonization can be divined from the international efforts to protect industrial design.

*Id.*

155. For discussions of global copyright harmonization, see Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 339 (2015); Jane C. Ginsburg, *International Copyright: From A 'Bundle' of National Copyright Laws to A Supranational Code?*, 47 J. COPYRIGHT SOC'Y. U.S.A. 265 (2000); Christian A. Camarce, *Harmonization of International Copyright Protection in the Internet Age*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 435 (2006); Ysolde Gendreau, *Copyright Harmonization in the European Union and in North America*, 20 COLUM.-V.L.A. J.L. & ARTS 37 (1995–1996); Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491, 571 (2006–2007) (stating: "What does it mean that copyright is globalized? This Part outlines the nature of G© and argues that G© is not a unified body of law, but rather is a complex web of inter-related layers of international law applied locally within the existing legal, political, and cultural environment. This local application renders the idea of a unified global law a fiction.").

jurisdiction beyond Europe,<sup>156</sup> some might find it beneficial.<sup>157</sup> For example, the infrastructure cost of maintaining a patent registry is a well-recognized impost for many nations, developed<sup>158</sup> and developing<sup>159</sup> alike. For some such nations, using an estab-

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156. For discussions of various viewpoints against the spread of developed nation intellectual property standards throughout the world, see, e.g., Akalemwa Ngenda, *The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?* 14 INFO. & COMM. TECH. L. 59-79 (2005); Graham Dutfield & Uma Suthersanen, *Harmonisation or differentiation in intellectual property protection? The lessons of history*, 23(2) PROMETHEUS 131-147 (2007). For references to the internationalization or globalization of intellectual property standards as neo-colonialism or neo-imperialism, see, e.g., Andreas Rahmatian, *Neo-Colonial Aspects of Global Intellectual Property Protection* 12(1) J. OF WORLD INTELL. PROP. 40-74 (2009); Ikechi Mgbeoji, *The Comprador Complex: Africa's IPR Elite, Neo-colonialism and the Enduring Control of African IPR Agenda by External Interests* 26 I.P.J. 313-330 (2014); Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LED. STUD. 11 (1998).

157. For insight into reasons for such viewpoints, see, e.g., Drahos, *supra* note 142, ch. 12; Dongwook Chun, *Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 127-166 (2011); Robert M. Sherwood, *Why A Uniform Intellectual Property System Makes Sense for the World*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE & TECHNOLOGY 68 (Mitchel B. Wallerstein et. al. eds., 1993); Kate H. Murashige, *Symposium: Intellectual Property: Article: Harmonization of Patent Laws*, 16 HOUS. J. INT'L L. 591(1994); Robert W. Pritchard, *The Future is Now -The Case for Patent Harmonization*, 20 N.C.J. INT'L L. & COM. REG. 291 (1995); Gerald J. Mossinghoff & Vivian Ku, *World Patent System Circa 20XX, A.D.*, 38 IDEA 529 (1998).

158. See, e.g., Toshiko Takenaka, *The Best Patent Practice or Mere Compromise? A Review of the Current Draft of the Substantive Patent Law Treaty and a Proposal for a "First-To-Invent" Exception for Domestic Applicants*, 11 TEX. INTELL. PROP. L.J. 259, 261-262 (2002-2003) ("The establishment of a global patent system has become an urgent necessity for patent offices in advanced industrial countries, particularly the United States, Japan, and Europe. The number of patent applicants seeking protection outside of the country of origin has drastically increased because of market globalization. When the patentable subject matter in areas such as biotechnology and computer software was expanded, the number of patent applications in those areas increased, as did the level of education necessary for examiners of such subject matter. . . . In short, the USPTO will not survive without implementing a system to reduce this administrative burden.") (internal citations omitted).

159. For a discussion of this point, see, e.g., Robert M. Sherwood, Vanda Scarcezini & Peter Dirk Siemsen, *Promotion Of Inventiveness In Developing Countries Through A More Advanced Patent Administration*, 39 J. L. & TECH. 473, 478-485 (1999); Drahos, *supra* note 142.



lished intellectual property registration system of another jurisdiction may involve an acceptable trade-off, where decision-making sovereignty with respect to that area of intellectual property could be conceded in return for greater efficiency and cost-saving. Particularly when countries already have high levels of standardization in their intellectual property laws as a result of international treaties or their legal traditions, a government might conclude that such a compromise is reasonable and in the national interest.

If non-EU nations were able to make a bottom-up choice to opt into EU intellectual property registration systems, and perhaps also into dedicated courts like the EPC, the effect would be to extend harmonization of EU intellectual property law further throughout the globe. This might be an unintended and controversial consequence of Brexit, but it would arguably serve the European Union's traditional goal of promoting peace through economic unification.<sup>160</sup>

#### *E. Brexit as a Trigger for Global Intellectual Property Harmonization?*

Could an international harmonization approach be applied to extend the jurisdiction of EU intellectual property rights, such as the EUTM, RCD, UCD, and UPC beyond EU territory? To the extent that Iceland, Liechtenstein, Norway and, Switzerland engage with the EU's intellectual property *acquis*,<sup>161</sup> there are indirect steps in this direction. If Britain were to have a soft Brexit with respect to intellectual property and were to continue to participate, for example, in the EUTM and/or the Unitary Patent and UPC, the effect would be to extend the application of EU intellectual property laws directly into territories beyond the European Union's physical borders. If the EUTM, RCD, UCD and/or UPC were to be extended to Britain, it is conceivable that the European Union may, in time, open them to other EEA and EFTA nations. In due course, it may even open them to non-EEA/EFTA nations.

Applying this approach more widely could also help the European Union to limit the effects of other nations following Britain

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160. Schuman Declaration, *supra* note 39.

161. Even if their national equivalents are harmonized with the EU law, those states do not directly participate in the EUTM, RCD, UCD, or the UPC. See discussion *supra* Part IV.

to the exit. If Member States were able to depart from the European Union, yet remain part of the EU's intellectual property frameworks, intellectual property harmonization would no longer be reliant on membership of the European Union or a state's physical presence in Europe. This situation would take time to eventuate, and it would require substantial reconstitution of the establishing instruments of the European Union's various intellectual property arrangements. Such an outcome, however, could help mitigate against the existential threat of disintegration that some in the European Union fear.

Moreover, it is feasible that any nation could eventually opt in to participating in a supra-EU intellectual property *acquis*. As intellectual property registrations in some EU nations already apply in countries on the other side of the world, this scenario seems plausible. Perhaps, in time, consideration would even be given to whether EUTMs and/or RCDs could be registered for application in jurisdictions as far flung as Australia, the United States, India, and/or China. If so, maybe they would one day be rebadged as "global trademarks" and "global designs." Maybe the expansion of the Unitary Patent into a "global patent" and international intellectual property courts modeled on the UPC would also develop. The effect would be the evolution of global intellectual property registration institutions and/or courts from supra-national foundations originally laid in EU law. This would help to overcome significant jurisdictional problems encountered by businesses seeking to enforce intellectual property rights in multiple jurisdictions across the world.

Such conjecture raises tantalizing questions about whether, in fact, the jurisdiction of EU intellectual property laws might eventually be extended around the world to many more non-EU nations. Without the benefit of a crystal ball, it is impossible to do more than speculate as to whether the EU's intellectual property *acquis* might one day form the foundation for harmonized supra-national intellectual property systems. Perhaps the UPC will become an international patent court, and perhaps it will be a model for specialist international courts with jurisdiction over other areas of intellectual property law. Given that the European Union has been active in promoting abroad its vision of intellectual property through treaty negotiations in the past, it is not inconceivable that it might come to promote global harmonization through an extension of the EU's intellectual property frameworks to other nations in the future.

Such a development could require some attitudinal shift within the European Union about the role of its intellectual property structures, and other sovereign nations would need to conclude that the benefits of joining harmonized intellectual property systems would outweigh the loss of legal autonomy associated with participating in international ventures of this nature. Such transformations do not seem imminent, but nor do they seem beyond the realms of possibility.

## CONCLUSION

This article has analyzed the restructuring of the intellectual property relationship between the European Union and Britain that will need to occur as a result of Brexit, and it has considered implications of these changes. It has provided historical and legal context for the negotiations that are now underway, and it has examined options that are open to the negotiators. These include the Norway Option, the Swiss Approach, and the Treaty Approach. The article has offered insight into a multitude of strategic considerations, such as logistic and political pros and cons of various alternatives, that will affect the likelihood that they are adopted.

The ways in which Britain and the European Union view these issues will shape policy decisions concerning Brexit and intellectual property law. The ways in which their representatives address these considerations during negotiations will forge the intellectual property relationship between Britain and the European Union for years to come. With the European Union currently having one of the world's largest economies, and Europe having become a hub of international intellectual property activity, this will, in turn, have widespread implications in a globalized world.

As well as examining the amendments that will need to be made to intellectual property jurisdiction in Britain and the European Union as a result of Brexit, this article has considered the possibility that Brexit might inadvertently spark a new era of global intellectual property harmonization. It has speculated as to ways in which this could eventuate if Britain were to negotiate a soft Brexit with respect to intellectual property arrangements with the European Union, even if the talks were to result in a hard Brexit in other respects. It has concluded that, if this

were to occur, Brexit could ultimately lead to an expansion, rather than a shrinking, of the EU's intellectual property jurisdiction.

Brexit was accompanied by a wave of fear about its fragmentary implications. In years to come, it would certainly be ironic if Brexit were to have resulted, not in a shrinking of the territory covered by the EU's intellectual property jurisdictions, but in the territorial extension of the EU's intellectual property jurisdiction. Perhaps the possibility that EU intellectual property law could, in time, come to apply directly in many other nations throughout the world will encourage EU negotiators to think ambitiously and 'go long' and soft when restructuring its intellectual property jurisdiction and relationship with Britain post-Brexit.<sup>162</sup>

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162. This article was completed in May 2017. Several developments have occurred between that time and the journal going to press in late 2017. As these events are ongoing, their consequences are not yet clear. Key developments include the commencement of Brexit negotiations between Britain and the European Union on June 19, 2017, and a challenge to German ratification of the UPC. See *supra* text accompanying note 66; see also Aria Bendix, *Brexit Negotiations Begin*, ATLANTIC (June 19, 2017), <https://www.theatlantic.com/news/archive/2017/06/brexit-negotiations-begin/530901/>.